(25,142)

20292

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 859.

JOHN H. SEARS, TRUSTEE, APPELLANT,

vs.

THE CITY OF AKRON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1916.

a District Court of the United States, Northern District of Ohio, Eastern Division.

JOHN H. SEARS, as Trustee, Plaintiff,
against
THE CITY OF AKRON, Defendant.

TRANSCRIPT OF RECORD.

On Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division.

b District Court of the United States, Northern District of Ohio, Eastern Division.

JOHN H. SEARS, as Trustee, Plaintiff,
against
THE CITY OF AKRON, Defendant.

Bill of Complaint.

Carroll G. Walter, Solicitor & Counsel for Plaintiff, 55 Wall Street, New York City.

Filed July 24, 1915.

1 District Court of the United States, Northern District of Ohio, Eastern Division.

JOHN H. SEARS, Plaintiff,
against
THE CITY OF AKRON, Defendant.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division, in Equity Sitting:

The above-named plaintiff, a citizen of the State of New York, and a resident and inhabitant of the County of Kings, State of New York, brings this, his bill of complaint in equity, against the above named defendant, a municipal corporation duly organized and existing under the laws of the State of Ohio and a citizen of said State having its principal office in and being an inhabitant of the Northern District of Ohio; and said plaintiff thereupon shows unto the Court and, upon information and belief, alleges:

First. The names, citizenship and residences of the parties to this

bill are as set forth in the introduction to this bill; and this
2 suit arises under the Constitution and laws of the United States, and the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000; and the jurisdiction of this Court in this cause depends upon the fact that this suit arises under the Constitution and laws of the United States and also upon the fact that it is a controversy of a civil nature between citizens of different States.

Second. On or about the 29th day of May, 1908, The Cuyahoga River Power Company was duly incorporated under and pursuant to the laws of the State of Ohio under the name of The Big Cuyahoga Light, Heat & Power Company, which name was thereafter and on or about the 12th day of November, 1908, duly changed to and now is The Cuyahoga River Power Company, and said company is now an existing corporation under the laws of the State of Ohio.

Third. Said corporation was formed for the purpose of acquiring, erecting, building, maintaining and operating dams in the Cuyahoga River in the State of Ohio to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes; of acquiring, holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as
3 may be necessary or convenient for the proper conduct of said business, and of doing any and all things necessary and incident to any of said purposes.

The original articles of incorporation of said company provided that the improvements of said company should begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River below the City of Akron, Summit County, Ohio, and extend along said Big Cuyahoga River through the County of Summit to a point where said Big Cuyahoga River crosses the line between Summit and Portage Counties.

Fourth. The incorporation of said company (hereinafter called "Power Company") was effected under and pursuant to an act of the Legislature of the State of Ohio passed in the year 1904 and contained in Volume 97 of Ohio Laws at page 300, formerly designated as Sections 3878 et seq. of the Revised Statutes, and now contained in Sections 10128 to 10134 of the Ohio General Code of 1910, the material parts of which are as follows:

"Section 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this State to raise and maintain a head of water, or for constructing and maintaining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be

generated, or for erecting and maintaining a line or lines of poles wherein to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes, or conduits, or by means of wires, cables, or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid.

"Section 10129. Such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations.

"Section 10132. Such company or companies, for the purpose of transporting natural gas, oils, water, and electricity, shall be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this State."

Fifth. By virtue of the incorporation of the Power Company under said statute a contract was duly made and entered into between the State of Ohio and said Power Company wherein and whereby said State duly granted to said Power Company the rights, powers, privileges and franchises set forth in said statute and in the articles of incorporation of said company, and said company thereby became and was possessed of and vested with all said rights, powers, privileges and franchises, and in particular, among other things, there was thus granted to said Power Company by the State of Ohio, and said company thus became possessed of and vested with, the right to exercise the State's power of eminent domain in order to appropriate and acquire for its own corporate purposes such private property as it deemed necessary for carrying out and performing the matters and things set forth in its said articles of incorporation.

Sixth. The rights, powers, privileges and franchises so granted to the Power Company as aforesaid were duly accepted by it and were of great value; and upon the faith thereof, said Power Company made large expenditures and investments and incurred large obligations. Said expenditures and investments were made and said obligations were incurred in large part prior to the 26th day of August, 1912.

Seventh. Immediately after its incorporation as aforesaid, said Power Company organized and commenced the transaction of its business, and with great diligence undertook the discharge of its cor-

porate duties. Among other things said company, at great cost and expense and upon the faith of said rights, powers, privileges and franchises so granted to it by said State of Ohio, caused surveys, maps, plans, plats and profiles to be made of the improvements proposed to be erected by said company, and caused estimates of the cost of construction to be made and provided; and on or about the third day of June, 1908, said company, by proper resolution of its Board of Directors, duly adopted a plan for the developments contemplated by its charter, which plan is known and designated as "Plan
6 of Roberts-Abbott Co., Consulting Engineers," and did thereby definitely locate its proposed improvements upon definitely specified lands, and did then and there enter upon, select, appropriate and determine to acquire the parcels of land set forth and described in the aforesaid plan and resolution and did then and there resolve to proceed forthwith to construct and build the improvements therein set forth and described.

Eighth. The plan so adopted by said Power Company provided for the construction of a dam at or near Portage Street, in the Village of Cuyahoga Falls, on the crest of the lower dam of the Falls Clutch & Machinery Company. The crest of said dam was fixed at an elevation of 1,000 feet above sea level, making the height thereof 70 feet; and by the adoption of said plan said Power Company resolved and determined to construct said dam and, by means of a suitable canal or conduit, to conduct the water of said river from the dam so constructed along the left bank of said river at an elevation slightly less than 1,000 feet above sea level to a point on said left bank a short distance westerly of the west corporation line of Cuyahoga Falls, at which point the bed of said river is at an elevation 760 feet above sea level; and said company further resolved and determined that, by means of a hydro-electric plant there to be constructed and equipped and suitably adapted for the purpose, it would convert into electric energy, the water power resulting from the 236 feet of fall which would be obtained from said dam and conduit.

Ninth. The reports, plans and surveys of said engineers as adopted by the Power Company contain specific descriptions of each and every parcel of land necessary to be acquired or utilized in the
7 carrying out of said plan and in the construction and erection of the improvements and delevopments specified therein; and said specific descriptions were duly adopted by the Board of Directors of said company on June 4, 1908, as descriptions of the parcels of land which said company proposed to acquire and utilize in the erection and construction of the dam, canal, conduit and hydro-electric plant which it had determined to erect; and said company thereby appropriated and resolved to acquire and utilize said parcels of land.

Tenth. After the adoption of said "Roberts-Abbott Plan" as aforesaid, said Power Company made further examinations and surveys of the water-shed of the Cuyahoga River; and at great cost and expense and upon the faith of the rights, powers, privileges and franchises so granted to it by the State of Ohio, it procured additional

surveys and the formulation of additional plans for the further and more extensive development of hydro-electric power from the waters of said river; and on April 23, 1909, said company, by appropriate corporate resolution, duly amended said "Roberts-Abbott Plan" by the adoption of a supplemental plan known as the "Von Schon Plan."

Said "Von Schon Plan" provided for the erection of a reservoir or dam, called Hiram Dam, south of Burton Station in Geauga County in order to provide storage for equalizing the flow of the river, and, also, for the diversion of a portion of the waters of the river, at a point about two miles above Cuyahoga Falls, into Silver Lake, and for the carrying of the water so diverted through Stow, Hudson and Boston Townships in Summit County (by means of artificial channels connecting the river and Silver Lake, Little Lakes, Mud Brook
8 Creek and Brandywine Creek) to the station of Vaughn, in Cuyahoga County. Said plan provided, also, for the erection of a power house at Vaughn for the development of hydro-electric power. The improvements so provided for in said plan are more particularly shown upon a map entitled "Map showing development of Cuyahoga River Power Company and character of titles required," and known as "Conservation Map," to which the plaintiff begs leave to refer and which will be produced upon the hearing of this suit.

Eleventh. On or about June 5, 1908, said Power Company duly instituted in the Probate Court of Summit County, Ohio, a court of competent jurisdiction in that behalf, a suit to condemn or appropriate, in accordance with the statutes of Ohio, the parcels of land mentioned and described in Paragraph Ninth hereof, and procured the summonses in said suit to be served upon the defendants therein. Said suit embraced a number of separate parcels of land and included all the lands necessary to be acquired and utilized in carrying out the development programme set forth in said Roberts-Abbott Plan. Said suit was contested by the owners of some of the properties affected thereby upon the ground, among other things, that said company's prior offers to purchase said property were invalid because the owners were not given a sufficient time to consider the same. Other defendants in said suit contested the same upon the ground that the descriptions of the various parcels of land contained in the petition upon which said suit was based were not "specific descriptions" as required by the statute. Said suit was prosecuted by said company with due diligence and was carried to the Supreme Court of the State of Ohio upon two separate appeals. Said Supreme Court
9 sustained the sufficiency of the descriptions in September, 1913, but decided, in January, 1912, that the offers to purchase were invalid because the owners were not given a sufficient time to consider them.

Twelfth. In the month of February, 1912, the articles of incorporation of said Power Company were duly amended so as to provide that the purposes of said company should be, and the fact is that since said date said purposes have been and now are, the purposes of acquiring, erecting, building, maintaining and operating a dam or a series of dams in the Cuyahoga River, Tuscarawas River, Mud Brook, Bran-

dywine and Tinkers Creeks and the tributaries of each of them, being situated in Cuyahoga, Medina, Summit, Portage, Stark, Geauga, Tuscarawas and adjacent Counties in the State of Ohio, to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is generated; of using said water as power in generating and producing electricity; of constructing, erecting or maintaining tubes, pipes or conduits through which electricity may be carried and transmitted, and a line or lines of poles whereon to attach or string wires or cables to carry or transmit electricity; of acquiring, producing, manufacturing, generating, transmitting or selling electricity for light, power and other purposes; of supplying and selling electricity to municipalities and other public agencies; of acquiring and holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or
10 convenient for the proper conduct of said business, and of doing any and all other things necessary and incident to any of said purposes.

Said amended articles of incorporation further set forth and the fact is that the improvements the Power Company will construct, not to be located at a single place, will be for the purpose of transmitting and conducting electricity and will have its eastern terminus at or near the Village of Burton Station in Geauga County, its western terminus at or near the confluence of Tinkers Creek and the Cuyahoga River in Cuyahoga County, and its southern terminus at or near Canal Dover in Tuscarawas County, and with its main line and branches will pass in or through the Counties of Cuyahoga, Summit, Medina, Portage, Stark, Geauga and Tuscarawas in said State.

Thirteenth. After the amendment of its said articles of incorporation said Power Company by appropriate corporate resolutions duly ratified the plans theretofore adopted by it; and at various times and from time to time said company duly located and adopted specific surveys and descriptions of each and every parcel of land necessary to be acquired and utilized in the construction and erection of its said improvements and in executing and carrying out its said plans. Said descriptions of said parcels of land were all duly adopted on or before the 7th day of May, 1912, and on said date there was, and ever since has been and there now is upon the records of said company duly adopted descriptions of each and every parcel of land necessary to be acquired and utilized for the purposes aforesaid. Said parcels of land of which said company has duly adopted descriptions as aforesaid are situated in, along, upon and adjacent to the Cuyahoga
11 River from a point above Burton Station in Geauga County to a point below the Village of Vaughn in Cuyahoga County, and have, as appurtenant thereto, all the riparian rights accruing to riparian owners under the laws of the State of Ohio.

Fourteenth. By its incorporation and organization aforesaid and by making the locations and taking the steps and proceedings and doing the acts and things hereinabove set forth for the carrying out

its corporate purposes hereinabove referred to, said Power Company acquired and became possessed of a vested right and franchise to construct and maintain, upon the lands and waters embraced within the descriptions so adopted by it as aforesaid, the reservoirs, dams, power houses and other appurtenances requisite for the development of hydro-electric power in accordance with the plans adopted by it, and to acquire and utilize said parcels of land for the accomplishment of its corporate objects and purposes and the prosecution of its corporate business, which said right and franchise is exclusive as against all other persons and corporations, and legally and equitably free from the interference of any person or corporation; and from and after the time of the adoption by said company of said descriptions of said parcels of land, the lands and waters embraced within said descriptions were and ever since have been and now are legally and equitably subject to said company's said franchise. Said right and franchise of said Power Company was granted to it by the State of Ohio under and by virtue of its contract with said State, and said right and franchise was and is a contract right and a right of property in the possession and use and enjoyment of which said Power Company and the plaintiff herein were and are entitled to and
12 claim the protection of the Constitution of the United States and the amendments thereof.

Fifteenth. Neither the defendant nor any other person or corporation had at any time prior to May 7, 1912, ever made any locations, surveys or appropriations of any of the waters of the Cuyahoga River for the purpose of utilizing said waters for any public water supply or hydro-electric purpose, and the proceedings and locations of said Power Company hereinabove set forth were and are for a public use and were and are prior in time and superior in right to all such proceedings and steps as have been taken by the defendant as hereinafter alleged to appropriate and acquire rights in and to the water of said Cuyahoga River; and said Power Company acquired and now has the prior right and franchise over every other person and corporation to appropriate and acquire the lands, waters, water rights, riparian rights, easements, and other privileges on the Cuyahoga River, for a public use, and now has therein an exclusive location and exclusive franchise for the purpose of developing and utilizing the waters thereof and of constructing, maintaining and operating the several improvements provided for in its articles of incorporation and the development plans adopted by it; and by virtue of its said acts and proceedings said Power Company acquired and now has the exclusive franchise to develop and utilize for a public use the water of the Cuyahoga River according to its said plans of development heretofore duly adopted as aforesaid, and said franchise is prior in point of time and superior in right to any powers, rights or franchises which the defendant may or can have or acquire in said river.

Sixteenth. The several parcels of land set forth in the de-
13 scriptions adopted by the Power Company as aforesaid are each and all necessary for the laying down or building of the tubing, conduits, pipes, dams, poles, wires, reservoirs, plants, power

houses, and for the erection of the tanks and reservoirs for the storage of water and the erection of stations which said Power Company resolved to lay down and erect; and said several parcels are each and all deemed by said Power Company to be necessary for the purposes aforesaid and such necessity had been declared and determined by said Power Company prior to the 7th day of May, 1912; and by reason thereof and the other facts, steps and proceedings hereinabove set forth, said Power Company acquired, and then and now has the right, power and franchise to acquire in invitum and utilize said several parcels of land and each of them in the prosecution and carrying out of the purposes aforesaid. The possession of said right and franchise vests in said Power Company, and said Power Company now has, and since long prior to May 27, 1912, has had, an equitable title to said several parcels of land and each of them and the absolute right and power to acquire the legal title to and absolute ownership of said several parcels of land and each of them, upon payment to the individual owners thereof such damages or compensation as may be assessed by a jury in appropriation proceedings instituted by said Power Company in accordance with the statutes of Ohio in such case made and provided, and said Power Company at all times has been and now is ready, willing and able to pay such damages or compensation.

Seventeenth. At all times since the incorporation and organization of said Power Company it has been and now is actively and diligently and in good faith engaged in the prosecution of its corporate business and in the acquisition of the rights, powers, privileges, fran-
14 chises, titles and property rights hereinabove mentioned and in the taking of each and every step necessary and proper to be taken for the purpose of accomplishing the purpose of its existence.

The ultimate object and end of the several improvements which said Power Company resolved and determined to erect and construct as hereinabove set forth is the utilization of the waters of the Cuyahoga River and its tributaries above mentioned for the development and sale of hydro-electric power for a public use. Said improvements, when developed and constructed in accordance with the plans heretofore adopted by said Power Company, will yield, at the proposed power plant at the Village of Vaughn, not less than 20,327 electric horse power for continuous service, ten hours daily, and will permit a net delivery of 52,560,000 kilowatt hours in the towns and cities of Ravenna, Kent, Cuyahoga Falls, Akron, Baberton, Massilon, Canton, Elyria, Lorain and Cleveland.

Within the territory which said Power Company, by means of its improvements aforesaid, can supply with hydro-electric power, there is a population of over 1,000,000 persons, and there now is and ever since the organization of said Power Company has been a market, demand, need and use for all the power thus capable of generation, and the purpose and intent of said Power Company is and always has been to sell and supply such power to all persons within said territory who may apply therefor and pay a reasonable price therefor. It is not and never has been the purpose or intent of said Power Com-

pany to utilize the waters of the Cuyahoga River or of its tributaries, or any of the parcels of land the descriptions of which it has adopted as aforesaid, for any other than a public use as herein set
15 forth; and the sole purpose of the organization of said Power Company and of the steps taken and proceedings had by it has been and is to devote the waters of said streams and the parcels of land aforesaid to said public use; and the plaintiff charges that, by the incoporation and organization of said Power Company and its adoption of the plans and the descriptions of the parcels of land hereinabove set forth, all said property was thereby devoted to the public use aforesaid and ever since has been and now is subject to said use and to the right of said Power Company to carry out and complete its said plans and undertaking.

Eighteenth. In addition to the benefit that will accrue to the public by the development of the power aforesaid, from waters which are now going to waste, the plans of development proposed by said Power Company are of great use, benefit and advantage to the public, in the following manner:

(1) Abundant storage to equalize the flow of the river at 300 cubic feet per second, even with two successive years of extreme drought, is secured by the reservoir in Geauga County, with a storage capacity of two and one-half billion cubic feet. This region is sparsely populated, and the site for the dam for said reservoir is located upon natural rock foundation. Said reservoir is located twenty-five miles up stream from the Village of Kent, and all danger from the construction of such a reservoir as is proposed by defendant is removed.

(2) The flow of said river is equalized in and through the Village of Kent in Portage County, doing away with flood damages and rendering also an abandoned water power of value and of great public benefit to the said village.

(3) The flow of said river is equalized and maintained at
16 300 cubic second feet to the limits of the Village of Cuyahoga Falls, in Summit County, providing a constant, reliable supply for domestic use and drainage.

(4) The flow of said river is diverted in part at Gaylord Bridge Dam and stored in the Brandywine Basin, thereby lessening dangers of floods in the main channel of the river and frequent damage to railroad property and interruption of freight and passenger service.

(5) The flow of said river is equalized through its entire length in Cuyahoga County from Vaughn to Lake Erie, thereby largely reducing the damages from floods of over two hundred riparian owners in said portion of the river, including particularly the City of Cleveland. The annual cost of dredging and removing the accumulation of debris is stated by the engineers of said city to vary from 45 to 90 thousand dollars per annum.

(6) The equalization of the flow of said river in the navigable portion thereof and under the control of the U. S. Government, is an aid to the navigability thereof and of great benefit to the shipping interests dependent upon or using the harbor of said City of Cleveland.

(7) About 700 owners of property are affected by the proposed development. The fee to the lands is required from 153 or 16% of

the whole. Diversion rights are required from 96 or 14% of the whole. The right to equalize the flow is required from 480 owners or approximately 70% of the whole. A very large proportion of the property of the present owners is benefited by the proposed plans.

Nineteenth. At all times since June 5, 1908, there have
17 been and now are pending in the courts of Ohio, one or more suits by said Power Company, as plaintiff, for the appropriation by said Power Company of one or more parcels of land in, along, upon and abutting on the Cuyahoga River, and the summonses in said suits were all duly served prior to May 27, 1912. The purpose of said suits was and is to acquire title to land for use in connection with said Power Company's proposed improvements, and said lands were and are necessary for the construction of said improvements. The pendency of said suits and the purpose thereof were well known to the defendant long prior to May 27, 1912.

In further prosecution of its corporate business and for the purpose of carrying out the plans heretofore adopted by it as hereinabove set forth, said Power Company has heretofore purchased from Harriet Keller and John C. Keller, her husband, of the City of Akron, Summit County, State of Ohio, and is now the absolute owner in fee simple of the following described real estate, to wit:

All that tract or parcel of land situated lying and being in the township of Cuyahoga Falls, county of Summit and state of Ohio, and known as part of lot No. 12, formerly Stow township, beginning at a point in the center line of the highway on the west bank of the Cuyahoga River at the old Village Bridge; thence northwesterly in the easterly line of the right of way of the Cleveland, Akron and Columbus Railroad 217 feet; thence easterly 92 feet to the westerly bank of the Cuyahoga River at the high water mark; thence southerly on said west bank 220 feet to the place of beginning, containing .22 acres of land be the same more or less.

18 Said lot was duly conveyed to said Power Company by deed from said Harriet Keller and John C. Keller, recorded in the office of the County Recorder of Summit County, Ohio, on June 18, 1915. Said property was purchased by said Power Company for the purpose of using the same in connection with and in furtherance of its corporate purposes aforesaid, and said Power Company intends to use said property for said purpose.

In further prosecution of its corporate business and for the purpose of carrying out the plans heretofore adopted by it as hereinabove set forth, said Power Company has purchased from Peter T. Boettler and Madge Boettler, of the Village of Kent, County of Portage, State of Ohio, so much of the bed of the Cuyahoga River as lies within the lands of said parties, in Lots Nos. 40, 41, 49, 50 and 51, in Franklin Township, Portage County, Ohio, together with the perpetual right to regulate and equalize the flow of said river in such manner as may be required by said Power Company in the development and operation of its hydro-electric project on said river, and said parties are obligated by a valid enforceable contract in writing to convey said property to said Power Company as the absolute fee simple owner thereof.

Each of the parcels of land so purchased by the Power Company, as above set forth, is situated in, upon and along the Cuyahoga River below the point at which the defendant threatens and intends to divert the waters of said river as hereinafter alleged; and each of said parcels is necessary for and was purchased for the purpose of being and is intended to be used in connection with and in furtherance of the corporate purposes of said Power Company.

19 In further prosecution of its corporate business and for the purpose of carrying out the plans heretofore adopted by it as hereinabove set forth, said Power Company acquired and is now the owner of an option to purchase the entire property, assets and plant of the Kent Water and Light Company, an existing corporation now engaged in supplying light and power to the public in the vicinity of the Village of Kent and the City of Akron, which option is an asset of great value to the said Power Company and was acquired by it for the purpose of utilizing the property, assets and plant of said Kent Water and Light Company in connection with and in furtherance of the corporate purposes of said Power Company as hereinabove set forth.

In further prosecution of its corporate business and for the purpose of carrying out the plans heretofore adopted by it as hereinabove set forth, said Power Company has obtained and is now the owner of options upon about five acres of land belonging to H. S. Morey, of Rapids, Ohio, and upon about thirty-eight acres belonging to Evaline Rice, of Rapids, Ohio, which parcels embrace the site of the Hiram Dam and part of the reservoir connected therewith. By said options said Power Company obtained and has control of said dam-site and is in fact the equitable owner thereof, and said options are of great value and were acquired for the purpose and with the intent of using said parcels of land in connection with and in furtherance of the corporate purposes of said Power Company, and said parcels of land are necessary for that purpose.

Twentieth. On the 27th day of May, 1912, the Council of the defendant, City of Akron, passed a resolution declaring an intent to appropriate property for water supply purposes, which resolution is known as Resolution No. 3241, and is in the words and figures following:

20 "Resolution No. 3241, Declaring Intention to Appropriate Property for Water-supply Purposes.

"Be it resolved by the Council of the City of Akron, State of Ohio, three-fourths of all the members elected thereto concurring, by reason of this resolution being an emergency measure:

"Section 1. That, by virtue and in exercise of the power and authority contained in House Bill No. 357 of the Ohio Legislature, contained in Vol. 102 of the Ohio Laws, page 175, passed by the Legislature of the State of Ohio, May 7, 1911, and in partial execution thereof, and by virtue and in exercise of every other power and authority thereto enabling, it hereby declares its intention to appropriate, for the purpose of supplying water to said City of Akron and

the inhabitants thereof, the following described property, and any and all rights or interest therein, to wit. All the waters of the Cuyahoga River at and above a line heretofore fixed as the axis of a proposed dam to be built by said city in the Township of Franklin, County of Portage, and State aforesaid; said line of proposed appropriation being approximately twelve hundred (1200) feet northeast from the point where the Cleveland & Pittsburg Division of the Pennsylvania Railroad now crosses said Cuyahoga River, and being shown upon a plan dated June, 1911, prepared by Frank A. Barbour and Edward G. Bradbury, and bearing the inscription, 'City of Akron Improvement of Water Supply; plan showing development
21 of Cuyahoga River; sheet 9;' and also all the waters of all the tributaries of said Cuyahoga River above said line of proposed appropriation, and all the waters which may flow into and from said Cuyahoga River, and the tributaries thereof, above said line, for the purpose of diverting the same, for the purpose aforesaid, at or near said line and not elsewhere.

"Section 2. This resolution is declared to be an emergency measure.

"Section 3. This resolution shall take effect from and after the earliest period allowed by law."

Twenty-first. Thereafter and on the 26th day of August, 1912, said Council of the defendant passed an ordinance to appropriate property for water-supply purposes, which ordinance is known as Ordinance No. 3396, and is in the words and figures following, to-wit:

"Ordinance No. 3396—To Appropriate Property for Water-supply Purposes.

"Be it ordained by the Council of the City of Akron, State of Ohio, two-thirds of all members elected thereto concurring:

"Section 1. That by virtue and in exercise of the power and authority contained in House Bill No. 357 of the Ohio Legislature contained in Vol. 102 of the Ohio Laws, page 175, passed by the Legislature of the State of Ohio, May 17, 1911, and in partial execution thereof, and by virtue and in exercise of every other power and authority thereto enabling the following described property and any and all rights or interest therein, be and the same is hereby
22 appropriated to public use for the purpose of supplying water to said City of Akron and the inhabitants thereof, to wit: All the waters of the Cuyahoga River at and above a line heretofore fixed as the axis of a proposed dam to be built by said city, in the Township of Franklin, County of Portage and State aforesaid; said line of appropriation being approximately twelve hundred (1200) feet northeast from the point where the Cleveland & Pittsburg Division of the Pennsylvania Railroad now crosses said Cuyahoga River, and being shown upon a plan dated June, 1911, prepared by Frank A. Barbour and Edward G. Bradbury and bearing the inscription 'City of Akron Improvement of Water Supply Plan Showing Development

of Cuyahoga River, Sheet 9;' and also all the waters of all the tributaries of said Cuyahoga River, above said line of appropriation, and all the waters which may flow into and from Cuyahoga River and the tributaries thereof above said line, for the purpose of diverting the same for the purpose aforesaid, at or near said line, and not elsewhere.

"Section 2. That the solicitor be and is hereby authorized and directed to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for such property.

"Section 3. That the costs and expenses of said appropriation be paid out of the proceeds of the sale of bonds issued under authority of an ordinance entitled 'Ordinance 3233, to issue bonds for
23 the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the water works of the City of Akron, Ohio, and for the purpose of supplying water to said City and the inhabitants thereof, passed May 27, 1912.

"Section 4. This ordinance shall take effect and be in form from and after the earliest period allowed by law."

Said ordinance did not take effect until the 10th day of September, 1912.

Twenty-second. The statute mentioned in said resolution and ordinance, viz., House Bill 357 of the Ohio Legislature, contained in Volume 102 of the Ohio Laws, page 175, passed by the Legislature of the State of Ohio, May 17, 1911, purports to release to the City of Akron whatever interest the State of Ohio, in its proprietary capacity and not as sovereign, might have in the waters of the Cuyahoga River, and does not confer upon the defendant any power, right or authority to appropriate private property or any right to exercise the power of eminent domain; and the resolution and ordinance hereinabove set forth were, in fact, enacted solely by virtue and in the exercise of an authority claimed by the defendant to be contained in Sections 3677 to 3697 of the Ohio General Code of 1910 and the acts amendatory thereof.

Twenty-third. Said Section 3677 of the Ohio General Code of 1910, as amended in March, 1910, by an Act contained in Ohio Laws, Vol. 101, pages 15 and 16, provides as follows:

"Sec. 3677. Municipal corporations shall have special power to appropriate, enter upon and hold, real estate within their corporate limits. Such power shall be exercised for the purpose and
24 in the manner provided in this chapter. * * * (Here are enumerated various purposes such as streets, parks, bridges, public halls, prisons, sewers, drains, gas, electric light, heat and power plants, etc.) * * *

"13. For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporations may appropriate property within or without the limits of the corporation, and for this pur-

pose any such municipal corporation may appropriate in the manner provided in this chapter, any property or interest therein, theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise. Either party to such appropriation proceedings shall have the same right to a change of venue as is now given by law in the trial of civil actions."

Said Sections 3679, 3680, 3681 and 3682 provide as follows:

"Sec. 3679. When it is deemed necessary to appropriate property, counsel shall pass a resolution, declaring such intent, defining the purpose of the appropriation, setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. For water works, purposes and for the purpose of creating reservoirs to provide for a supply of water, the counsel may appropriate such property as it may determine to be necessary."

"Sec. 3680. Immediately upon the passage of such resolution, declaring such intent, for which but one reading shall be necessary, the mayor shall cause written notice thereof to be given to the owner, person in possession thereof, or having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent, and such notice shall be served by a person designated for the purpose, and return made in the manner provided by law for the service and return of summons in civil actions. If such owner, person, or his agent can not be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the corporation, and council may thereupon pass an ordinance by the votes of two-thirds of all members elected thereto, directing such appropriation to proceed."

"Sec. 3681. Upon the passage of such ordinance, the solicitor shall make application to the court of common pleas or to a judge in vacation, to the probate court, or to the insolvency court, in the county in which the land sought to be taken is located, which application shall describe as correctly as possible the land to be appropriated, the interest or estate therein to be taken, the object proposed, and the name of the owner of each lot or parcel thereof."

"Sec. 3682. Notice of the time and place of such application shall be given in the ordinary manner by serving legal process, to all owners or agents of owners resident of the state, whose place of residence is known, and to all others by publishing the substance of the application, with a statement of the time and place at which it is to be made, once a week for three weeks next preceding the time of the application in some newspaper of general circulation in the county."

In so far as said Section 3679 provides that, for water works purposes and for the purpose of creating reservoirs to provide for a supply of water, the council of a municipal corporation may appropriate such property as it may determine to be necessary, it is contrary to and in conflict with Section 16 of Article 1 of the Constitution of Ohio, in that it makes such council the final and sole arbiter of the necessity for an appropriation of property for said purposes and ousts the courts of jurisdiction to determine such necessity. There is no necessity for an appropriation of the property of said Power

Company or of all the waters of the Cuyahoga River at the point specified in defendant's said ordinance; and in taking the proceedings hereinafter set forth the defendant herein is acting contrary to said provision of the Constitution of Ohio and under color of the authority of a statute which is in conflict with and contrary to said Constitution.

The said resolution and said ordinance of the defendant furthermore fail to comply with the statutes under which they were passed and are null and void.

Said Section 3679 is also contrary to and in violation of Section 10 of Article 1 of the Constitution of the United States and of the
27 Fourteenth Amendment to said Constitution in that it authorizes a taking of private property by a municipality without any determination of the necessity for such taking other than the determination of the Council of such municipality, which determination is made without any hearing and without the owners of such property having any opportunity to be heard; and the defendant herein, under color of authority of said statute, is now proceeding to take private property upon its own determination of the necessity for such taking when no such necessity in fact exists; and thereby said Power Company is being deprived of its property without due process of law and its contract with the State of Ohio is being impaired by a law of said State of Ohio and the acts and proceedings of the defendant under color of authority of such law.

Twenty-fourth. Neither the Mayor nor any other officer or agent of the defendant has at any time caused any written notice of the passage of the resolution aforesaid to be given to said Power Company or to the plaintiff or to any of its or his authorized agents, and no such notice has at any time been served upon said Power Company or this plaintiff, although said Power Company could readily have been found, and although said defendant and its Mayor and other officers and agents well knew that said Power Company was the owner and had an interest of record in a large and material part of the property which would of necessity be taken and appropriated in carrying out the resolution and ordinance aforesaid.

Neither the solicitor nor any other officer or agent of said defendant has, either upon the passage of the ordinance aforesaid or at any other time, made any application to any Court for the appro-
28 priation of the property owned and possessed by said Power Company or in which it had an interest of record, and neither said defendant nor anyone for it has paid to said Power Company or to anyone for it any damages or compensation whatsoever for all or any portion of the property of said Power Company which said defendant has or is about to take and appropriate or which will of necessity be taken and appropriated in carrying out the resolution and ordinance aforesaid.

By reason thereof said defendant has failed to observe and has grossly violated the laws and authority under which it attempts and purports to act, and is depriving said Power Company of its property without due process of law.

Twenty-fifth. On September 3, 1912, the people of the State of

Ohio duly adopted an amendment to the Constitution of the State of Ohio by adding to said Constitution Article XVIII thereof, which is entitled "Municipal Corporations" and deals, among other things, with the subject of the acquisition of public utilities by municipal corporations, including the defendant herein. Said amendment took effect on November 15, 1912, and it is therein provided, among other things, as follows:

"Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance, and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance, it shall not take effect until submitted to the electors and approved by a majority of
29 those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of questions of choosing a charter commission."

It was further provided in said amendment that all cases pending in the Courts on the first day of January, 1913, should be heard and tried in the same manner and by the same procedure as was authorized by the law at the time of the adoption of said amendment.

The defendant herein had not, on November 15, 1912, acquired or constructed or contracted for the acquisition or construction of the public utility which it is now engaged in acquiring and constructing under color of authority of the resolution and ordinance above set forth, and said defendant did not on that day nor on January 1, 1913, have any case pending in any Court for the appropriation or acquisition of any property to be used by it in its public utility aforesaid.

The plaintiff charges that the effect of said constitutional amendment was to repeal Sections 3677 to 3697 of the Ohio General Code of 1910 and the amendments thereof then existing, to the extent that said existing statutory provisions are inconsistent with the provisions of said constitutional amendment; and that from and after the 15th day of November, 1912, the defendant therein was and ever since has been and now is without any right, power or authority whatsoever to take any step or proceeding to acquire or construct or contract for the acquisition or construction of any public utility, unless and until said defendant shall comply with each and every of the requirements and provisions of said constitutional amendment, all of which provisions are hereby referred to
30 and hereby asked to be read in connection with and as a part of this bill. Said defendant has not complied with the requirements and provisions of said constitutional amendment; and, in particular, said defendant is attempting to acquire and construct said public utility without having given the electors of said municipality any opportunity to approve, vote on, or demand a referendum upon any ordinance providing for the acquisition or construction of such public utility, and is, on the contrary, proceeding

to acquire and construct such utility solely and exclusively upon the City Council's determination of the wisdom, expediency, necessity, and propriety of such acquisition and construction.

By reason thereof the acts and proceedings of said defendant in acquiring and constructing said public utility and in appropriating the property of said Power Company are without authority in law and are illegal and amount to a taking and deprivation of the property of said Power Company without due process of law, in violation of the Constitution of Ohio and of the Constitution of the United States and the Fourteenth Amendment thereof.

Twenty-sixth. The average flow of the Cuyahoga River at the point fixed in the defendant's ordinance aforesaid as the point at which said defendant's proposed dam would be erected, is equal to 300 cubic feet per second, or an average daily flow of 194,000,000 gallons per day. The present population of the defendant does not now exceed 110,000 persons and at no time within the next thirty-five years will it exceed 300,000 persons. The defendant city and its inhabitants cannot consume for any legitimate public use more than 100 gallons per capita per day; and of the water which
31 said defendant proposes by its said ordinance to take from said river, not more than fifteen per cent thereof will or can be applied to any legitimate public use at any time within the next thirty-five years, and all water in excess of said fifteen per cent of the amount which said defendant by said ordinance proposes to take will be applied to private use and not to a public use. Said defendant is utterly without any power or authority to acquire or take or appropriate any property whatsoever for any private use, either by condemnation proceedings or otherwise, and such taking is unconstitutional and void and amounts to a taking and deprivation of the property of said Power Company without due process of law, in violation of the Constitution of the United States and the amendments thereof.

Twenty-seventh. The defendant is not situated or located upon the Cuyahoga River. The defendant, on the contrary, is situated on the Little Cuyahoga River and the waters thereof are available to the defendant for purposes of municipal supply and are adapted for that purpose, and the watershed of said Little Cuyahoga River is of sufficient area, if properly developed with suitable storage reservoirs, to furnish the entire supply of water needed by the defendant at the present time and for many years in the future. The defendant is located also upon the watersheds of the Tuscarawas River and of the Portage Lakes; and the Tuscarawas River and its watershed and said Portage Lakes are available as sources of water supply for the defendant city and are sufficient, if properly developed, to furnish an abundant supply of water for all legitimate public uses and requirements of the defendant and its inhabitants for many years to come. The sources hereinabove mentioned, other than the Cuyahoga River, are the natural, logical, economical
32 and reasonable sources of municipal water supply for the defendant and are more fully available to it than is the Cuyahoga River at the point at which the defendant, under its said

resolution and ordinance, proposes to take and appropriate the waters of said Cuyahoga River.

The defendant's proposed taking and appropriation of the waters of the Cuyahoga River, as specified in its said resolution and ordinance, are not in any sense necessary, and there is no necessity therefor; and such taking and appropriation would, on the contrary, unnecessarily interfere with other public uses and irreparably destroy property already devoted to a public use, to wit: the property and franchises of the Power Company and the various parcels of land and water-rights necessary for the exercise, use and enjoyment of said franchises; and such taking and appropriation is for that reason unauthorized by law and is illegal and constitutes a taking of the plaintiff's property without due process of law, in violation of the Constitution of the United States and the Fourteenth Amendment thereof.

The plaintiff further charges and avers that the action of the defendant in attempting to take the waters of the Cuyahoga River is not for any real or supposed benefit or advantage to the inhabitants of the defendant, but is taken in bad faith and fraudulently, for the private benefit and advantage of certain individuals and private corporations, adversely to the interests of the public, and pursuant to a conspiracy, plan and agreement between certain of the officials of the defendant and said individuals and private corporations.

Twenty-eighth. Long prior to the passage of the defendant's resolution and ordinance hereinabove set forth, the defend-
33 ant had full knowledge and notice of the rights of said Power Company upon the Cuyahoga River and of its plans for utilizing the waters of said river for the development of hydro-electric power; and after the passage of said resolution and ordinance said Power Company, well knowing that the defendant could not possibly consume for any legitimate public use more than a small percentage of the amount of the water which, by said ordinance, it proposed to take, negotiated with the defendant for such a harmonizing of the plans of the defendant and said Power Company as would secure to each party a reasonable use of the waters of said river, and said Power Company, as a further proposition of compromise, offered to pay to the defendant the sum of $1,000 per mile for the right to equalize the flow of said river above and to the point at which the defendant proposed to erect its dam. But although such harmonizing of the plans of the defendant and said Power Company would have enabled the defendant to take and utilize all the water which it could really devote to any legitimate public use for a period of at least thirty-five years, and although such equalization of the flow of said river would have been of great benefit to the defendant, all said offers and proposals of the Power Company were rejected by the defendant. This rejection was not for any real or supposed benefit or advantage to the inhabitants of the defendant but was in bad faith and for the purpose of hindering the proposed development of the Power Company upon said river and for the private benefit and advantage of certain individuals and

private corporations, adversely to the interests of the public, and pursuant to a conspiracy, plan, and agreement between certain of the officials of the defendant and said individuals and private corporations.

34 Twenty-ninth. Shortly after the defendant's rejection of the proposals made to it by the Power Company, as set forth in the preceding paragraph, said Power Company, on or about April 10, 1913, served upon the defendant a notice in the words and figures following, to wit:

"It has been called to the attention of the undersigned corporation that the City of Akron advertised for bids to be received on April 8, 1913, for contracts for the erection of a dam and construction of a reservoir, to carry out some scheme or plan, as mentioned in such advertisements, for the diversion, at or near Kent, of the water of Cuyahoga River for water supply for the City of Akron and its inhabitants.

"This corporation, in its letter to you, dated March 29, 1913, has fully outlined the purposes and powers of the corporation, and a repetition in this letter is unnecessary. You and each of you are hereby notified that any diversion of the water of Cuyahoga River, at or about Kent, by the City of Akron, will necessarily invade the exclusive rights which this company now has in and to the waters of the Cuyahoga River, and that this corporation stands on its rights."

Thirtieth. Acting under an assertion of power from the State of Ohio and under color of an authority claimed by it to be contained in and conferred by the statutes and ordinance hereinabove set forth, and in purported and attempted compliance therewith, but in fact in excess and abuse of the powers and authority conferred by said statutes and ordinance, and in disregard of the protests and objections of the Power Company, and in violation

35 and derogation of the rights of said Power Company as herein set forth, the defendant has entered and is now trespassing upon the lands and waters in and to and against which the Power Company has acquired rights as hereinabove set forth, and is constructing on a portion thereof a dam or reservoir for the impounding of the waters of the Cuyahoga River at the place specified in said ordinance, and is threatening to and is announcing its intention of diverting the waters of said river at the point aforesaid before or by the 1st day of August, 1915; all in direct violation and disregard of the rights, property, powers, privileges, and franchises of the Power Company and to the great damage and injury thereof.

Thirty-first. If the defendant herein divert the waters of the Cuyahoga River in accordance with its announced plan and intention, it will be impossible for said Power Company to exercise or carry on its corporate purposes or attain its corporate objects or take advantage of or use the parcels of land in and to and against which it has acquired rights as herein set forth; the State's grant and command to the Power Compny to develop hydro-electric power from the waters of said river will be nullified; and the property, rights, powers, privileges and franchises so granted to, acquired by, and

vested in the Power Company as hereinabove alleged, will be thereby impaired, injured, damaged, destroyed and rendered useless and valueless, to the great and irreparable injury of said Power Company and the persons interested therein; and unless the defendant be enjoined and restrained by this Court, it will divert the waters of the Cuyahoga River in accordance with its announced plan and intention and will thereby cause and inflict upon said Power Company and the persons interested therein an irreparable injury,
36 for which there is no adequate remedy at law.

Thirty-second. The defendant herein has not made any effort or taken any step or proceeding to acquire the property, rights, powers, privileges and franchises of the Power Company, or any of them, although the Power Company's ownership and possession of said property, rights, powers, privileges and franchises were and are well known to the defendant; nor has said defendant paid or offered to pay to the Power Company any compensation whatsoever for its said property, rights, powers, privileges and franchises, or any damages for the impairment or destruction thereof or injury thereto. The defendant, on the contrary, asserts and claims that it is authorized and empowered by the statutes and ordinance aforesaid to do and perform all the acts and things done and performed by it as herein alleged, without acquiring any of said property, rights, powers, privileges and franchises of the Power Company and without paying any compensation or damages whatsoever.

Said defendant is furthermore without funds with which and is financially unable to pay the damages which will be caused to said Power Company by a diversion of the waters of the Cuyahoga River in accordance with the announced plan and intention of the defendant, or to pay any reasonable or substantial compensation for the property of said Power Company of which said defendant is depriving said Power Company; and said defendant has not made any provision for raising or obtaining the money necessary to pay such damages and compensation and by reason of the debt limit fixed by the statutes and Constitution of Ohio said defendant is and will be unable to raise or obtain the money necessary for that purpose.

37 Thirty-third. On the 15th day of July, 1915, the Power Company, for the purpose of carrying out and performing a contract made by it in April, 1909, duly executed and delivered to the plaintiff a mortgage or trust deed, dated July 13, 1915, whereby it conveyed to the plaintiff all its property, rights, powers, privileges and franchises, including the property, rights, powers, privileges and franchises hereinabove set forth, in trust to secure the payment of the principal and interest of a series of bonds of said Power Company of the aggregate principal amount of $150,000. A copy of said mortgage is hereto annexed, marked Exhibit A, and hereby made part of this bill. Said mortgage was filed for record in the offices of the County Recorders for Geauga, Portage and Summit Counties, Ohio, on July 16, 1915. Of the bonds so secured by said mortgage, $105,000 par value thereof, being bonds Nos. 60 to 270 inclusive, have been duly issued for a valuable consideration and are now in the hands of bona fide holders for value; and bonds Nos. 1

to 60 inclusive are now in process of being exchanged for the existing notes of the Power Company as provided for in said mortgage. The consideration or value for which said bonds were issued was, in fact, devoted by the Power Company to and used by it in the acquisition of the property, rights, powers, privileges and franchises set forth in said mortgage.

The value of the property held by the plaintiff as Trustee under said mortgage is largely dependent upon the continuance unimpaired of the Power Company's right and franchise to appropriate and use the waters of the Cuyahoga River, and the lands to which the same are appurtenant, to the extent necessary and convenient for the execution of its corporate purpose of developing and
38 furnishing hydro-electric power in accordance with the plans of said company heretofore adopted by it as hereinabove alleged. The other property covered by said mortgage, although costing a large sum of money, will be of comparatively small value if dissociated from the franchise aforesaid or if that franchise be impaired and destroyed by a consummation of the defendant's threat to take and divert the waters of said river in accordance with its said ordinance; and if the defendant's threatened diversion of said waters be consummated, the property and assets of the Power Company will be wholly insufficient to pay the obligation secured by said mortgage as hereinabove set forth; and it is necessary for the protection of the security held by the plaintiff in trust as aforesaid that the plaintiff be protected and preserved in his right, as mortgagee of said Power Company, to the utilization of the parcels of land hereinabove described in the carrying out and consummation of the corporate purposes of the Power Company. By the terms of said mortgage the plaintiff is given power to protect said mortgage-security by appropriate suit or action.

Thirty-fourth. On or about July 14, 1913, said Power Company filed in the District Court of the United States for the Northern District of Ohio, Eastern Division, a bill in equity against the defendant in this suit, praying that said defendant be enjoined and restrained from constructing any dam or reservoir in the Cuyahoga River and from appropriating the waters of said river as proposed in its said ordinance, and for general relief. Said suit so instituted by said Power Company was continuously pending until July 7, 1914, when the same was dismissed for want of jurisdiction.
39 An appeal was taken by said Power Company from said decree of dismissal to the Supreme Court of the United States and said appeal is now pending in that Court, but cannot be heard until October, 1915. The plaintiff was not and is not a party to said suit and did not, directly or indirectly, participate in the prosecution thereof, and in the present state of said litigation it is impossible for the plaintiff to intervene in said cause or bring to the attention and knowledge of the Court certain facts which were omitted from and did not exist at the time of the filing or at the time of the hearing of said suit so brought by the Power Company; and it is necessary for the plaintiff, in order to protect the rights of

the parties whom he represents as herein set forth, to institute and prosecute this separate suit.

Thirty-fifth. By reason of the premises, the obligations of the Power Company's contracts with the State of Ohio herein set forth (which are included among the property conveyed to the plaintiff as aforesaid) are being impaired by laws of said state and the acts and doings of the defendant under color of authority of such laws and under an assertion of power from the state; all in contravention and in violation of Section 10 of Article I of the Constitution of the United States. In like manner and by like means the Power Company's property is being taken and said company is being deprived of its property (including the property upon which said mortgage is a lien) without due process of law and without compensation; all in contravention and in violation of the Fourteenth Amendment to the Constitution of the United States; and the plaintiff invokes the jurisdiction of this Court upon those grounds for the purpose
40 of enforcing his rights under said Constitution and the amendments thereof.

Forasmuch, therefore, as the plaintiff is without remedy save in this Court, sitting in equity, he therefore prays:

1. That the City of Akron be made a party defendant to this bill of complaint and required to answer the same, but not under oath, an answer under oath being hereby expressly waived.

2. That the Power Company's contracts with the State of Ohio hereinabove alleged, and the property, rights, powers, privileges and franchises of the Power Company and of the plaintiff hereinabove set forth, be established and adjudged by decrees of this Court.

3. That the various acts, statutes, laws and proceedings hereinabove complained of as violating the Power Company's rights under the Constitution of the United States and the amendments thereof be adjudged and declared unconstitutional and void.

4. That the defendant herein, its officers, attorneys, agents, servants, workmen and contractors, and all persons, firms, corporations and officers whatsoever be forever enjoined and restrained from in any way trespassing upon or interfering with or impairing or injuring any of the property, rights, powers, privileges and franchises of The Cuyahoga River Power Company; and, in particular, that said defendant and all such other persons be forever enjoined and restrained from continuing the construction of any dam or reservoir in the Cuyahoga River and from taking or diverting or appropriating all or any part of the waters of the Cuyahoga River or its tributaries, at the point described in the ordinance set forth in his
41 bill, or at any other point where such taking, diversion or appropriation would in any way injure or affect the property, rights, powers, privileges and franchises of The Cuyahoga River Power Company, or at any place where such taking, diversion or appropriation would in any manner interfere with the prompt and proper prosecution of the plans of development adopted by The Cuyahoga River Power Company as set forth in this bill, and from in any manner or by any means interfering with the natural, normal

and accustomed flow of the Cuyahoga River at any point above the Village of Vaughn, Cuyahoga County, Ohio.

5. That a preliminary injunction in accordance with the last preceding prayer be forthwith granted pending the hearing and determination of this suit, to continue in force during the pendency of this suit and until the granting of a permanent injunction in accordance with the said last preceding prayer.

6. That the defendant be required and compelled by mandatory injunction or other suitable process of the Court, either to remove such portions of its dam and other structures and devices as have been already erected by it in interference with the property, rights, powers, privileges and franchises of The Cuyahoga River Power Company as set forth in this bill, or to convey and grant the same to The Cuyahoga River Power Company or to this plaintiff for use by said Power Company in connection with its said rights and franchises.

7. That a Receiver be appointed forthwith to take possession of so much of the reservoir or dam and other structures and devices as have been already erected and constructed by the defendant and to hold and preserve the same and all matters and things in-
42 cidental thereto and connected therewith, in order that the same may be applied and disposed of in accordance with the decree of this Court to be entered herein.

8. That, as incidental to such relief, the defendant be decreed to account for and pay over to the plaintiff the damage occasioned to The Cuyahoga River Power Company by the defendant's violations and takings of the property, rights, powers, privileges and franchises of said company; and that such damages be assessed by this Court upon the entry of the decree herein.

9. That the plaintiff have all such other, further, different, or general relief, by way of damages, or the alternative, or otherwise, as may be proper and just in the premises.

10. That the plaintiff have writs of injunction and a Receiver in conformity with the prayers of this bill; that all proper orders and decrees be entered herein, all proper inquiries made, accounts taken, and proceedings had, in conformity with law and the practice of this Court; and that the plaintiff have a writ of subpœna directed to the defendant commanding it to appear and answer this bill of complaint and abide and perform all such orders and decrees as to the Court shall seem proper and as may be required by the principles of equity; and the plaintiff will ever pray.

JOHN H. SEARS,
By CARROLL G. WALTER, *Solicitor.*

CARROLL G. WALTER, *Counsel.*

43 UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

John H. Sears, being duly sworn, deposes and says: That he is the plaintiff named in the foregoing bill of complaint; that he has

read the foregoing bill of complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JOHN H. SEARS.

Sworn to before me this 23rd day of July, 1915.

THOMAS H. LEE,
Notary Public.

New York Certificate No. 51.
New York Register No. 7027.

44 EXHIBIT A.

The Cuyahoga River Power Company

to

John H. Sears, Trustee.

First Mortgage Securing $150,000 *Par Value First Mortgage 5 Per Cent. Twenty-Year Gold Bonds.*

Dated July 13, 1915.
Filed in Geauga, Portage and Summit Counties July 16, 1915.

45 This Indenture, dated the 13th day of July, 1915, made and entered into by and between The Cuyahoga River Power Company, a corporation duly organized and existing under the laws of the State of Ohio (hereinafter sometimes called the "Power Company"), party of the first part, and John H. Sears, of the City, County and State of New York (hereinafter sometimes called the "Trustee"), party of the second part.

Whereas, under the laws of the State of Ohio the Power Company is authorized to borrow money, acquire property and contract for services, and to issue its negotiable bonds therefor and secure the payment thereof by mortgage upon its property, rights, franchises and privileges; and

Whereas, the Power Company heretofore and in the month of April, 1909, did borrow money and contract for services and property and promise to pay for the same in part by the issue of its first mortgage bonds of the par value of one hundred fifty thousand ($150,000) dollars, and has received cash, property and services of a value in excess of one hundred fifty thousand ($150,000) dollars; and

Whereas, the persons entitled to receive the bonds of said company under the contract and obligations aforesaid have demanded that said company forthwith issue and deliver its first mortgage bonds pursuant to and in compliance with the contract and obligations aforesaid; and

Whereas, the stockholders of the Power Company at a meeting duly held have duly consented to and authorized the issue of bonds of the Power Company of the aggregate principal amount of
46 one hundred fifty thousand ($150,000) dollars, to bear interest at five (5%) per cent. per annum, and have authorized the execution of a mortgage upon all the assets, property and franchises now owned by or to be hereafter acquired by the Power Company for the purpose of securing said bonds; and

Whereas, the Board of Directors of the Power Company by virtue of all powers vested in said board by law as well as in pursuance of said consent and authority of said stockholders duly authorized the President or Vice-President and the Secretary or Treasurer of the Power Company from time to time to execute and deliver to the Trustee for authentication by him the bonds of the Power Company to an aggregate amount of one hundred fifty thousand ($150,000) dollars, dated the 13th day of July, 1915, maturing on the 13th day of July, 1935, and bearing interest at the rate of five (5%) per cent. per annum, payable semi-annually on the first day of January next ensuing the date thereof and on the first days of July and January in each succeeding year thereafter until said bonds are fully paid; and

Whereas, for the purpose of securing the prompt and punctual payment of the principal and interest of said bonds as the same shall become due, said Board of Directors duly authorized and directed the President or Vice-President and the Secretary or Treasurer of the Power Company to execute, acknowledge and deliver to the Trustee a mortgage or deed of trust upon all the property, rights, franchises and privileges of the Power Company now owned or hereafter to be acquired; and

Whereas, the bonds to be issued hereunder and the Trustee's Certificate thereon shall respectively be in substantially the words and figures following, to wit:

47 *Form of Bond.*

UNITED STATES OF AMERICA,
State of Ohio:

The Cuyahoga River Power Company.

First Mortgage Twenty Year Five Per Cent. Gold Bond.

No. —. $500.

The Cuyahoga River Power Company, a corporation duly organized and existing under the laws of the State of Ohio (hereinafter called the "Power Company"), for value received, promises to pay to bearer, or, if this bond be registered, to the registered holder thereof, on the 13th day of July, 1935, the sum of five hundred ($500) dollars in gold coin of the United States of America of or equal to the present standard of weight and fineness, and to pay

interest on said sum at the rate of five (5%) per centum per annum, payable in like gold coin, on the first day of January, 1916, and on the first days of July and January of that and each succeeding year until said principal sum is paid. All such payments, both of principal and interest, shall be made at the office or agency of the Power Company in the City of Cleveland, Ohio, or, at the option of the holder, at the office or agency of the Power Company in the City of New York, and in each instance without reduction for any taxes, assessments or governmental charges which the Power Company or the Trustee hereinafter mentioned, or either of them, may be
48 required to pay or to retain therefrom under any present or future law of the United States of America or of any State, County, Municipality or other taxing authority, the Power Company agreeing to pay all such taxes, assessments and governmental charges.

This bond is one of a series of bonds of the Power Company, the amount whereof is limited so that there shall never be at any one time outstanding bonds of said series for an aggregate principal sum exceeding one hundred fifty thousand ($150,000) dollars face amount, all of which bonds are of like date and bear interest at five (5%) per centum per annum, payable semi-annually. Said bonds are numbered consecutively from 1 to 300 and are secured by a trust deed or mortgage dated the 13th day of July, 1915, duly executed, acknowledged and delivered by the Power Company and duly recorded, conveying to John H. Sears as Trustee all the property, real and personal, rights, franchises and privileges now owned by said Power Company or hereafter acquired by it, to which Indenture reference is hereby made for a description of said property and franchises, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions under which said bonds are issued and secured, and under which they may be called before maturity, and the holder of this bond, by accepting the same, hereby assents to all the provisions of said Indenture.

In case a default as defined in said Indenture shall occur,
49 the principal of the bonds of said series may become or be declared due and payable in the manner and with the effect provided in said Indenture.

This bond is negotiable and shall pass by delivery unless registered as to principal in the owner's name at the office or agency of the Power Company in the City of Cleveland or in the City of New York, such registry being noted on this bond. After such registry no transfer shall be valid unless made by the registered holder in person or by his attorney duly authorized and similarly noted on this bond; but the same may be discharged from registry by being in like manner transferred to bearer, and thereupon transferability by delivery shall be restored. This bond may again from time to time be registered or discharged from registry in the same manner.

No recourse shall be had for the payment of the principal or interest of this bond against any past, present or future incorporator, stockholder, officer or director of the Power Company or of any successor corporation or corporation into which it may be consolidated or merged, either directly or through the Power Company or

through such other corporation by virtue of any statute or constitution or by the enforcement of any assessment or any penalty or otherwise howsoever, any and all liability of such incorporators, stockholders, officers and directors being hereby waived and released.

This bond shall not be or become valid or obligatory for any purpose unless and until authenticated by the certificate endorsed thereon of the Trustee under said Indenture.

In witness whereof, The Cuyahoga River Power Company has caused these presents to be signed by its President or Vice President and its Secretary or Treasurer, and its corporate seal to be hereto affixed as of the 13th day of July, 1915.

THE CUYAHOGA RIVER
POWER COMPANY,

By —— ——.

Attest:

—— ——.

Form of Trustee's Certificate.

This is one of the series and issue of bonds described in the within mentioned Indenture.

——— ———, *Trustee.*

And whereas, all things necessary to make said bonds, when duly authenticated by the Trustee, valid, binding and legal obligations of the Power Company and to make this Indenture a valid, binding and legal instrument for the security thereof have been done and performed, and the issue of said bonds as in this Indenture provided has been in all respects duly authorized:

Now, therefore, this Indenture witnesseth, that The Cuyahoga River Power Company, pursuant to and for the purpose of fulfilling and carrying out and performing its contract and obligation aforesaid, and in consideration of the cash and property received by it and of the services performed for it, and in consideration of the sum of one ($1) dollar, lawful money of the United States, to
50 it in hand paid by the Trustee, the receipt of all of which is hereby acknowledged, and in pursuance of the direction and authority of its stockholders and Board of Directors given as above recited, and in order to secure the prompt and punctual payment of the principal and interest of its bonds aforesaid and the fulfillment of the promises, covenants and agreements herein and in said bonds contained and recited, hath granted, bargained, sold, aliened, transferred, conveyed, assigned, set over, pledged, released and confirmed, and by these presents doth grant, bargain, sell, alien, convey, assign, transfer, set over, pledge, release and confirm unto said John H. Sears as Trustee and to his successor in the trusts hereby created and his assigns forever, the following described property, rights, powers, privileges and franchises, to wit:

I. All that tract or parcel of land situate, lying and being in the Township of Cuyahoga Falls, County of Summit and State of Ohio,

and known as part of Lot No. 12, formerly Stow Township, beginning at a point in the center line of the highway on the west bank of the Cuyahoga River at the Old Village Bridge; thence northwesterly in the easterly line of the right of way of the Cleveland, Akron & Columbia Railroad 217 feet; thence easterly 92 feet to the westerly bank of the Cuyahoga River at the high water mark; thence southerly on said west bank 220 feet to the place of beginning, containing .22 acres of land, be the same more or less; being the premises conveyed to The Cuyahoga River Power Company by Harriet Keller and John C. Keller, her husband, by deed recorded in the office of the County Recorder of Summit County, Ohio, on June 18, 1915, in Volume 505, at page 432; together with the right to use said property in the manner and for the purposes set forth in said deed, and all the riparian rights appurtenant to said land.

II. All the right, title and interest of The Cuyahoga River Power Company in and to so much of the bed of the Cuyahoga River as lies within the lands of Peter T. Boettler and Madge Boettler in Lots Nos. 40, 41, 49, 50 and 51 in Franklin Township, Portage County, Ohio, together with the perpetual right to regulate and equalize the flow of said river in its bed on the lands of said Peter T. Boettler and Madge Boettler in such manner as may be required in the development and operation of the hydro-electric project of said company on said river, being the rights acquired by The Cuyahoga River Power Company under a contract with said Peter T. Boettler and Madge Boettler dated June 4, 1915, and recorded in the office of the County Recorder of Portage County, Ohio, on the — day of ——, 1915, in Volume — at page —.

III. All the right, title and interest of The Cuyahoga River Power Company in and to the following described parcels of real estate, being the parcels selected and located by The Cuyahoga River Power Company on June 3, 1908, as parcels of property required and to be acquired for the project of said company, together with the right to acquire and use said parcels of real estate for the purposes expressed in the charter of The Cuyahoga River Power Company:

C. M. Walsh—Parcel No. 1:

(Walsh Milling Co.)

Beginning at the intersection of the center of the Cuya-
51 hoga River at the north side of Portage Street, in the Village of Cuyahoga Falls, Summit County, Ohio: thence westerly along the north side of Portage Street to the intersection of the high bank of the west side of the Cuyahoga River and the north side of Portage Street: thence northerly along the said high bank on the westerly side of the Cuyahoga River to a point 30 feet north of the crest of the dam, as now located, of the Walsh Milling Company: thence easterly to the center of the Cuyahoga River to a point approximately 30 feet north of the crest of aforesaid dam: thence southerly along the center of the Cuyahoga River to the place of beginning.

Containing approximately 0.5 acres with all the privileges, easements and appurtenances thereunto belonging.

C. M. Walsh—Parcel No. 2:

Beginning at a point in the center of Prospect Street in the Village of Cuyahoga Falls, Summit County, Ohio, on the high bank of the Cuyahoga River on the easterly side thereof: thence easterly along the center of said Prospect Street to the high bank on the westerly side of said River: thence northerly along the high bank of said river to the north line of said C. M. Walsh's property where same joins the property of the Walsh Paper Company: thence easterly, following the said north line of C. M. Walsh's property across the Cuyahoga River to the high bank on the easterly side of same: thence southerly along the high bank to the easterly side of said Cuyahoga River to the place of beginning. Containing 0.9
52 acres more or less, with all the privileges, easements and appurtenances thereunto belonging.

The Falls Rivet & Machine Company—Parcel No. 1:

Beginning at the point of intersection of the center of the Cuyahoga River and the north line of Portage Street, in the Village of Cuyahoga Falls, Summit County, Ohio: thence northerly along the center of said River to a point approximately 30 feet north of the crest of the Walsh Milling Company's dam, as now located; thence easterly to a point on the high bank of the Cuyahoga River on the easterly side thereof, said point being approximately 30 feet north of the crest of the aforesaid Walsh Milling Company's dam: thence southerly along the high bank on the easterly side of the Cuyahoga River to the north line of Portage Street: thence westerly along the north line of Portage Street to the place of beginning. Containing approximately 0.4 acres more or less, with all the privileges, easements and appurtenances thereunto belonging.

The Falls Rivet & Machine Company—Parcel No. 2:

Beginning at a point on the westerly bank of the Cuyahoga River, said point being north 34 degrees and 35 minutes east 380.16 feet, and north 32° east 89.1 feet from a stone set in the north line of Chestnut Street in the Village of Cuyahoga Falls, Summit County, Ohio, both of these lines being along lines owned by the heirs of J. Millbank: thence in a line which passes through a
53 recess which is cut into a large rock near the east edge of the water of the Cuyahoga River to receive the end of the timber of the "Chuckery" dam, and through a point on the west side of the gorge south of the husk or wheel house, which point is about 24 feet south of a mark cut in the perpendicular rock on said west side near the bottom by F. D. Paul and G. B. Turner, the east end of said line being on the top of the east bank of the river: thence 31° 45′ east 237.6 feet: thence north 10° east 258.72 feet: thence north 14° east 178.21 feet: thence north 80 degrees 45′ west 99 feet along the south line of the Cyrus Prentis tract. The west end of this line may also be found by beginning in the east line of Front Street 1.69 chains north 9 degrees 15′ east of the first angle in the east line of

said Front Street south of Broad Street, and which line is also 21 links south of the center line of Prospect Street: thence along the easterly line of land belonging to Fannie S. Beebe to the southeasterly corner of her land: thence along the southerly line of said Fannie S. Beebe's land one rod: thence in a southerly direction to a point one rod westerly from the place of beginning: thence one rod east to place of beginning. Containing approximately 1.5 acres, more or less, with all the privileges, easements, appurtenances thereunto belonging.

Turner, Vaughn & Taylor:

Beginning at the intersection of the westerly high bank of the Cuyahoga River, and the north line of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio: thence westerly along the north line of Portage Street 49½ feet: thence southerly
54 across said Portage Street to the south line of same: thence easterly along the south line of said Portage Street 49½ feet to the said westerly high bank of the Cuyahoga River: thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same, across Broad Street in said Village of Cuyahoga Falls, Summit County, Ohio, to the dividing line between the property of said Turner, Vaughn & Taylor Company and the property of the Walsh Paper Company: thence easterly across the Cuyahoga River to the southeast corner of the property of said Turner, Vaughn & Taylor Company on the easterly high bank of said Cuyahoga River: thence northerly along the high bank of said Cuyahoga River on the easterly side thereof and following the meanderings of same across Broad Street in said Village of Cuyahoga Falls, and across Portage Street also in said Village of Cuyahoga Falls, to the northerly line of said street: thence westerly along the north line of said street to the place of beginning. Containing approximately 6.3 acres more or less, with all the privileges, easements and appurtenances thereunto belonging.

The Walsh Paper Company:

Beginning at the intersection of the westerly high bank of the Cuyahoga River in the Village of Cuyahoga Falls, Summit County, Ohio, and the dividing line between the property of said Walsh Paper Company and the property of Turner, Vaughn & Taylor Company: thence southerly along the high bank of the Cuya-
55 hoga River on the westerly side thereof and following the meanderings of same to the line between the property of the said Walsh Paper Company and the property of C. M. Walsh: thence easterly across the Cuyahoga River to the southeast corner of the property of said Walsh Paper Company, said corner being on the easterly high bank of said River on the easterly side thereof and following the meanderings of same to the southeast corner of the property of Turner, Vaughn & Taylor Company, said corner being also the dividing line between the property of Turner, Vaughn & Taylor, and the said Walsh Paper Company: thence westerly across

the Cuyahoga River to the place of beginning. Containing approximately 0.8 acres, more or less, with all the privileges, easements and appurtenances thereunto belonging.

Fannie S. Beebe:

Beginning at the northeast corner of said Fannie S. Beebe's property on the north line of Prospect Street and on the west side of the Cuyahoga River, in the Village of Cuyahoga Falls, Summit County, Ohio; thence southerly along the west line of said Fannie S. Beebe's property to the southwest corner of same; thence easterly along the line between the property of said Fannie S. Beebe and the property of The Falls Rivet & Machine Company; thence northerly along the line between the property of said Fannie S. Beebe and the property of The Falls Rivet & Machine Company, said line being the easterly line of the property of said Fannie S. Beebe, to the south
56 line of Prospect Street; thence westerly along the south line of Prospect Street to the place of beginning, being all of the lot of land belonging to Fannie S. Beebe lying south of Prospect Street and west of the Cuyahoga River. Containing .67 acres of land more or less, with all the privileges, easements and appurtenances thereunto belonging.

A. B. & C. R. R. Company:

Beginning at an iron pin in the southwest corner of said Railroad Company's land, said pin being on an island in the Cuyahoga River; thence north 1 degree and 20′ east along said Railroad Company's west line to a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence southeasterly to the south line of said Railroad Company's property at a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence along the south line of said Railroad Company's land to the place of beginning. Containing — acres more or less, with all the privileges, easements and appurtenances thereunto belonging.

Henry A. Everett:

Beginning at the point of intersection of the center of the Cuyahoga River and the north and south township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees and 30′ east 100 feet; thence easterly and southeasterly along the northerly bank of said Cuyahoga River 100 feet distant from the
57 center line of said River, following the meanderings of same, to a point on the line between the property of said Henry A. Everett and the property of the A. B. & C. R. R. Company, said point being 100 feet distant from the center of the Cuyahoga River, measured at right angles with same: thence southerly 1 degree 20′ west along said line between the property of Henry A. Everett and the property of the A. B. & C. R. R. Company to the southwest corner of the property of said A. B. & C. R. R. Company: thence southerly 88 degrees east of the south line of the property of the A. B. & C. R. R.

Company, said line being the dividing line between the property of the A. B. & C. R. R. Company and the property of Henry A. Everett, to a point 100 feet distant from the center of the Cuyahoga River measured at right angles with same, thence southeasterly and northeasterly along the northerly bank of the Cuyahoga River 100 feet distant from the center line thereof, and following the meanderings of same, to a point on a line of the land of said Henry A. Everett, said line being an extension northerly of the east line of Tract No. 3, Portage Township, Summit County, Ohio, and also being 100 feet distant from the center of the Cuyahoga River measured at right angles with same: thence northerly along said line to a stone pipe: thence northerly along the high bank of the Cuyahoga River and one rod westerly on same the follow- courses and distances: 34 degrees 35′ east 264 feet; thence northerly 27 degrees 35′ east 286.44 feet; thence northerly 2 degrees 30′ west 116.16 feet; thence northerly 24 degrees 10′ west 138 feet; thence northerly 8 degrees
58 40′ east 107.6 feet; thence northerly 19 degrees 31′ east 108.24 feet; thence north 36 degrees 40′ east 168.3 feet; thence north 53 degrees 40′ east 454.7 feet; thence north 35 degrees east 280.8 feet to the northeast corner of the lot owned by Tom Patterson; thence northerly following along the westerly bank of said Cuyahoga River to the southeast corner of the property of the Falls Rivet & Machine Company; thence along the line between the land of The Falls Rivet & Machine Company and the property of Henry A. Everett to a point on the easterly bank of said River 100 feet distant, measured at right angles with the center of said river.

IV. All the right, title and interest of The Cuyahoga River Power Company in and to each and every other parcel of real estate selected and located by said company as parcels of real estate required and to be acquired for the project of said company, including the entire bed of the Cuyahoga River from a point at or near the Village of Burton Station in Geauga County to a point at or near the confluence of Tinkers Creek and the Cuyahoga River in Cuyahoga County and to a point at or near Canal Dover in Tuscarawas County, they being the termini of the proposed improvements of said company expressed in the amended articles of incorporation filed in the office of the Secretary of State of the State of Ohio, and including the property which on May 7, 1912, was owned by W. S. Kent, lying and being in the Village of Kent, Franklin Township, Portage County, Ohio, and bounded and described as follows:

Commencing at a point on the center line of Main Street,
59 at the West end of the Stone Bridge over the Cuyahoga River; thence South thirty-one (31) degrees forty-five (45) minutes West a distance of eleven hundred and forty-two (1142) feet; thence South thirty-six (36) degrees East seventy (70) feet; thence South thirty (30) degrees (30) minutes West One Hundred and seventy-five (175) feet; thence South fifty-five (55) degrees East one hundred and eighty-four (184) feet; thence North forty (40) degrees fifteen (15) minutes East four hundred and thirty-eight (438) feet; thence North thirty (30) degrees fifteen (15) minutes East five hundred and forty-five (545) feet; thence North twenty

(20) degrees fifteen (15) minutes East five hundred and eighteen (518) feet to the intersection of the Baltimore and Ohio Railroad Company, right of way and Main Street; thence West along the center line of Main Street; two hundred and twenty (220) feet to the place of beginning. Containing approximately eight and six-tenths (8.6) acres of land, with all the privileges, easements and appurtenances thereto belonging.

And also the following described portion of the property which on May 7, 1912, appeared of record, as owned by the Akron Water Works Company, situated in the County of Portage, State of Ohio, and known as being a part of original Lots Nos. 90 and 100 of the Township of Streetsboro and original Lots Nos. 73, 74, 71, 72, 56, 57 and 58 of the Township of Franklin and being more particularly bound and described as follows:

Beginning at a stake in the northerly line of lands of the
60 City of Akron in said Original Lot No. 90 said Northerly line being the center line of the Cleveland and Wellsville Turnpike and said stake being distant S. 74 deg. 15′ E. along said center line, about 50 feet from the easterly end of the iron highway bridge in said Turnpike over the Cuyahoga River.

Thence on and along certain courses having the following bearings and distances:

Course 1, S. 17 deg. 20′ W., 617.0 feet to a stake. Said course 1 intersects the south line of Original Lot 90, at a point which is distant along said course about 255 feet from the place of beginning, and is also distant westerly along said south line of Original Lot 90 about 1195 feet from the southeasterly corner thereof.

Course 2, S. 65 deg. 05′ W. 800 feet to a stake.
Course 3, S. 10 deg. 03′ E. 341.5 feet to a stake.
Course 4, S. 51 deg. 45′ E. 599.7 feet to a stake.
Course 5, S. 4 deg. 35′ W. 552.0 feet to a stake.
Course 6, S. 35 deg. 14′ W. 498.1 feet to a stake.
Course 7, S. 2 deg. 32′ W. 788.9 feet to a stake.
Course 8, S. 29 deg. 29′ W. 585.6 feet to a stake.
Course 9, S. 16 deg. 39′ W. 224.3 feet to a stake.
Course 10, S. 40 deg. 31′ W. 1317.1 feet to a stake.
61 Course 11, S. 35 deg. 36′ W. 613.3 feet to a stake.
Course 12, S. 63 deg. 10′ E. 445.8 feet to a stake.
Course 13, S. 20 deg. 36′ E. 1146.5 feet to a stake.
Course 14, S. 4 deg. 56′ W. 649.9 feet to a stake.
Course 15, S. 41 deg. 05′ W. 2480 feet to a stake.
Course 16, S. 0 deg. 40′ E. 240.3 feet to a stake.
Course 17, S. 50 deg. 52′ W. 562.8 feet to a stake.
Course 18, N. 61 deg. 37′ W. 285.2 feet to a stake.

Said Course 18 intersects the west line of said Original Lot 72 at a point distant westerly along said Course 18, about 190 feet from said stake at its easterly end, and is also distant northerly along said west line of Original Lot 72 about 281.0 feet from the southwesterly corner thereof.

Course 19, S. 55 deg. 30′ W. 823.6 feet to a stake.
Course 20, S. 37 deg. 15′ W. 611.3 feet to a stake.

Course 21, S. 85 deg. 22′ W. 354.5 feet to a stake.
Course 22, S. 30 deg. 19′ W. 887.4 feet to a stake.
Course 23, N. 75 deg. 40′ W. 733.6 feet to a stake.
Course 24, S. 26 deg. 45′ W. 280.0 feet to a stake.
62 Course 25, N. 84 deg. 09′ W. 492.5 feet to a stake.
Course 26, S. 20 deg. 24′ W. 366.0 feet to a stake.
Course 27, S. 78 deg. 53′ W. 933.5 feet to a stake.
Course 28, N. 33 deg. 55′ W. 1005.8 feet to a stake.
Course 29, S. 84 deg. 33′ W. 1241.0 feet to a stake.

Said Course 29 intersects the west line of said Original Lot 57 at a point distant westerly along said Course 29, about 540 feet from said stake at its easterly end, and is also distant northerly along said west line of Original Lot 57 about 1430.0 feet from the southwesterly corner thereof.

Course 30, S. 37 deg. 14′ W. 343.7 feet to a stake.

Course 31, S. 75 deg. 28′ W. 208.9 feet to a stake in center line of the C. & P. R. R. Co.'s old Right of Way.

Course 32, N. 33 deg. 40′ W. along said center line, 175.7 feet to a stake.

Course 33, N. 45 deg. 23′ E. 686.4 feet to a stake.
Course 34, N. 52 deg. 21′ E. 215.2 feet to a stake.
Course 35, S. 69 deg. 32′ E. 312.4 feet to a stake.
Course 36, N. 82 deg. 23′ E. 1031.3 feet to a stake.

Said Course 36 intersects the east line of said Original Lot 58 at a point distant easterly along said Course 36 about 260 feet from said stake at its westerly end and is also distant southerly along
63 said east line of Original Lot 58 and the east line of Original Lot 69 in said Franklin Township about 1660 feet from the northwest corner of a 111.72 acre parcel of land conveyed by Frank Beckwith et al. to the City of Akron by deed in Vol. 221, Page 570 of said Portage County records.

Course 37, S. 25 deg. 52′ E. 1063.0 feet to a stake.
Course 38, N. 63 deg. 38′ E. 986.8 feet to a stake.
Course 39, S. 82 deg. 52′ E. 455.5 feet to a stake.
Course 40, N. 12 deg. 40′ E. 365.8 feet to a stake.
Course 41, S. 75 deg. 38′ E. 809.7 feet to a stake.
Course 42, N. 22 deg. 05′ E. 983.4 feet to a stake.
Course 43, S. 83 deg. 26′ E. 469.2 feet to a stake.
Course 44, N. 24 deg. 09′ E. 437.5 feet to a stake.
Course 45, N. 71 deg. 47′ E. 330.3 feet to a stake.
Course 46, N. 52 deg. 04′ E. 578.1 feet to a stake.
Course 47, N. 89 deg. 32′ E. 632.1 feet to a stake.
Course 48, N. 26 deg. 58′ W. 594.0 feet to a stake.
Course 49, N. 45 deg. 30′ E. 607.0 feet to a stake.

Said Course 49 *interests* the north line of a 23.78 acre parcel of land conveyed by J. H. Meyers et ux. to the City of Akron by
64 deed recorded in Vol. 222, Page 76 of said Portage County records, at a point distant northeasterly along said Course 49 about 332 feet from said stake at its southwesterly end and is also distant easterly along said north line of said 23.78 acre parcel of land about 392 feet from the northwesterly corner thereof.

Course 50, N. 16 deg. 19′ W. 996.8 feet to a stake.
Course 51, N. 56 deg. 59′ Y. 829.4 feet to a stake.
Course 52, N. 10 deg. 54′ W. 617.2 feet to a stake.
Course 53, N. 37 deg. 44′ E. 743.9 feet to a stake.
Course 54, N. 44 deg. 51′ E. 601.5 feet to a stake.
Course 55, N. 25 deg. 04′ E. 738.8 feet to a stake.
Course 56, N. 6 deg. 36′ W. 541.1 feet to a stake.
Course 57, N. 21 deg. 50′ E. 1129.5 feet to a stake.

Said Course 57 intersects the north line of said Original Lot 73 at a point which is distant northeasterly along said Course 57 about 195 feet from said stake at its southwesterly end and is also distant easterly along said north line of Original Lot 73, about 583 feet from the northwest corner thereof and is also distant easterly along said north line about 465 feet from the southwest corner of said Original Lot 100 in Streetsboro Township.

Course 58, N. 54 deg. 18′ W. 550.8 feet to a stake.
65 Course 59, N. 20 deg. 06′ W. 646.7 feet to a stake.
Course 60, N. 65 deg. 25′ E. 1039.6 feet to a stake.

Course 61, N. 11 deg. 04′ E. 448.2 feet to a stake in said northerly line of lands of the City of Akron.

Course 62, S. 74 deg. 15′ E., along said northerly line 188.3 feet to the place of beginning, and containing — acres, excepting therefrom that part of the above described parcel which lies southwesterly of the northeasterly Right of Way line of the said C. & P. R. R. Company and containing about 0.16 acres of land and also excepting therefrom that part of the above described parcel lying between said northeasterly Right of Way line of the C. & P. R. R. Company and the westerly line of said 111.72 acre parcel of land conveyed by Frank Beckwith to the City of Akron and between the center of the Cuyahoga River and the northerly bank thereof and containing about 1.5 acres of land.

V. The right or franchise of The Cuyahoga River Power Company to appropriate and use the waters of the Cuyahoga River and the lands to which the same are appurtenant for the purpose of developing and furnishing hydro-electric power, and the contract of the Cuyahoga River Power Company with the State of Ohio by which the said franchise was granted; and all and each and every the rights, authorities, privileges, immunities, grants, payments and benefits which the Power Company now has and is entitled to have or may hereafter have or be entitled to have and enjoy under
66 the charter of the Power Company, and the acts, steps and proceedings of the Power Company thereunder.

VI. Also all corporate property, powers, rights, franchises, license and privileges of the Power Company now owned or controlled or that may be hereafter owned, controlled or acquired by it.

VII. Also all rights of way, licenses, easements, leases and leasehold estates now owned or hereafter acquired by the Power Company.

VIII. Also the property, real, personal and mixed, chattels, fixtures, rights, franchises and privileges of whatsoever nature or description hereafter acquired by the Power Company.

IX. Also all and singular the tenements, hereditaments and appurtenances now or hereafter belonging or in any wise appertaining unto the aforesaid property, rights, franchises and privileges, and the reversions, remainders, rents, issues, profits, income, revenues and proceeds thereof.

X. Also all the present and hereafter acquired estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the Power Company of, in and to the premises, property, rights, franchises and privileges hereinabove and hereinafter described, and every part and parcel thereof, with the appurtenances.

XI. Also all rights of condemnation and appropriation and all other choses in action now possessed or hereafter acquired by The Cuyahoga River Power Company.

To Have and to Hold the above described premises, property, rights, power, privileges, franchises and the appurtenances
67 thereunto belonging or in any wise appertaining unto the said Trustee, his successors and assigns forever; but in trust, nevertheless, under and subject to the conditions hereinafter set forth, for the benefit and security of all present and future holders of the bonds issued and to be issued under this Indenture and to secure the payment of such bonds and the interest thereon when payable in accordance with the provisions of such bonds and of this Indenture, and to secure the performance of the covenants and agreements of the Power Company in this Indenture set forth in the order and according to the number which each of said bonds shall bear, as hereinafter set forth in detail.

And it is hereby covenanted and agreed that all such bonds are to be issued, authenticated and delivered, and that all property subject or to become subject to the lien or provisions of this Indenture is to be held subject to the further covenants, conditions, uses and trusts hereinafter set forth, and the Power Company, for itself, its successors and assigns, does covenant and agree with the Trustee and with the respective bondholders from time to time of said bonds, as follows, to wit:

Article I.

The Power Company shall forthwith duly execute and deliver to the Trustee Two hundred and seventy (270) of the three hundred (300) bonds authorized by this indenture, said bonds to be numbered consecutively from 1 to 270 inclusive. Bonds Nos. 1 to 10 inclusive shall be entitled to priority over all other bonds, but shall be of equal priority as among themselves. Bonds Nos. 11 to 60
68 inclusive shall be entitled to priority over all bonds bearing higher numbers, but shall be of equal priority as among themselves. All other bonds issued under this indenture shall have priority according to their respective numbers, beginning with Bond No. 61, as entitled to priority next after Bonds Nos. 11 to 60, and continuing consecutively from thence on to Bond No. 270. If and when Bonds Nos. 271 to 300 inclusive are issued, said bonds

shall rank in right of priority next after Bond No. 270, beginning with Bond No. 271 and continuing thence consecutively to Bond No. 300.

Article II.

Bonds Nos. 61 to 270 inclusive shall be forthwith authenticated by the Trustee and delivered to the Power Company. Bonds Nos. 1 to 60 inclusive shall be held by the Trustee unauthenticated until the delivery to him of the outstanding notes of the Power Company, and, upon the delivery to him of any of the now outstanding notes of the Power Company, he shall authenticate and deliver to the holder or holders of such note or notes such number of said bonds numbered 1 to 60 as shall equal at par the face amount of the note or notes so delivered. In determining the number of the bond or bonds to which any noteholder is entitled, the Trustee shall act in accordance with the certificate of the President of the Power Company, and such certificate shall be full and complete protection to the Trustee. The Trustee shall endorse upon each note so delivered to him a statement showing that it has been exchanged for one of the bonds issued under this indenture, which statement shall show the number of the bond or bonds exchanged therefor. The
69 endorsement of such statement shall destroy the further negotiability of such note, but shall not impair the position of the Trustee as a bona fide holder thereof for value or be deemed a satisfaction or discharge of such note; and each note so delivered to the Trustee and exchanged by him for bonds in accordance with the provisions hereof shall be held by him under and pursuant to the terms of this indenture, as additional collateral security for the bonds issued hereunder.

Article III.

Bonds Nos. 271 to 300 inclusive shall not be executed or authenticated by the Trustee until the Board of Directors of the Power Company shall pass a resolution authorizing such execution and authentication, and when such resolution is passed said bonds shall be executed and authenticated and disposed of in accordance with such resolution, and any resolution certified by the Secretary of the Power Company as a copy of a resolution passed by the Board of Directors of said company shall be sufficient evidence of the right of the Trustee to authenticate such bonds and otherwise comply with the terms of said resolution, and he shall not be subject to any liability or responsibility for acting in accordance with a resolution so certified.

Article IV.

The Power Company will, upon presentation of any of the bonds issued under this indenture, and under such reasonable regulations as it may prescribe, register without charge or expense to the
70 holder the ownership of such bond. Such registry shall be noted on the bond, after which no transfer shall be valid unless made by the registered holder in person or by his attorney

duly authorized and similarly noted on the bond; but any bond so registered may be discharged from registry by being in like manner retransferred to bearer, after which it shall be transferable by delivery. Any bond transferred as payable to bearer may be registered again in the name of the holder thereof with the same effect as a first registration. Successive registrations and transfers as aforesaid may be made from time to time as desired and each registration of a bond shall be noted thereon.

Article V.

Only such bonds as bear thereon endorsed a certificate substantially in the form hereinbefore mentioned, duly signed by the Trustee, shall be secured by this indenture or entitled to any lien, right or benefit hereunder. No such bond shall constitute or evidence a contract of the Power Company or be valid or obligatory for any purpose unless and until the same has been authenticated as aforesaid by the Trustee. Such certificate of the Trustee upon any such bond, signed and sealed by the Power Company, shall be conclusive and the only evidence that the bond so authenticated has been duly issued hereunder and that the holder or registered owner thereof is entitled to the benefit of the trust hereby created and that said bond evidences a binding contract and is a valid obligation of the Power Company.

Article VI.

71 As to all bonds registered as herein provided, the person in whose name the same shall be registered shall, for all purposes of this indenture and also for the payment of interest, be deemed and regarded as the owner thereof, and thereafter payment of the interest and principal of said registered bond shall be made only to or upon the order of such registered holder thereof. All such payments shall be valid and effectual to satisfy and discharge liability upon such bonds to the extent of the sum or sums so paid. The Power Company and the Trustee, and each of them, may deem and treat the bearer of any bond which shall not at the time be registered, as the absolute owner of such bond for the purpose of receiving payment of the principal thereof and of the interest thereon and for all other purposes whatsoever, and neither the Power Company nor the Trustee shall be affected by any notice to the contrary. Payment of any interest accruing upon any unregistered bond to the bearer or holder thereof shall satisfy and discharge all liability for the interest so paid.

Article VII.

The Power Company covenants that it will punctually pay the principal and interest of every bond issued hereunder and secured hereby, in gold coin of the United States of America of the present standard of weight and fineness, at the time and in the manner specified in said bond. It further covenants that it, its successors and assigns will from time to time and as often as may be necessary

in the opinion of the Trustee to maintain and keep in force and effect the lien and encumbrance created by this indenture,
72 make, do, execute and acknowledge all such further acts, deeds, conveyances, assignments, transfers and assurances in the law as may be reasonably advised, devised and required for effectuating the intention of these presents and for the better assuring and confirming unto the Trustee of all and singular the property hereby mortgaged and pledged or intended or agreed so to be, and will from time to time execute any and all such further and supplemental mortgages as may be necessary in the opinion of the Trustee to make any property hereafter *required* by the Power Company subject to this indenture, so that the same will afford additional security to the bonds issued hereunder.

Article VIII.

The Power Company reserves to itself, its successors and assigns, the right at its or their election to redeem the whole or any part of the bonds issued hereunder on any interest paying day prior to maturity at 100% of the face amount of the principal thereof, plus accrued interest to the fixed date for the redemption thereof. In the event the Power Company elects to redeem as aforesaid it shall give two months' notice of its intention to redeem to the holders of said bonds, or in default of such notice shall pay to such holders interest thereon for two months subsequent to the date of such redemption.

Article IX.

All bonds issued under this indenture shall be exchangeable at the option of the Power Company for any bonds of the same face amount and bearing the same interest which may at any time be issued by the Power Company under the authorization of
73 the Public Service Commission of Ohio or any commission which may be hereafter vested with the powers of said existing commission; such bonds, however, shall be of equal priority with the bonds for which they are exchanged.

In case default shall be made in the payment of any instalment of interest on any of the bonds issued hereunder and said default shall have continued for a period of six months, or in case default shall be made in the due observance or performance of any other covenant or agreement of the Power Company in this indenture contained and such default shall have continued for a period of six months after written notice thereof from the Trustee, then and in every such case the Trustee may, and if the holders of 75% in amount of the bonds then outstanding in writing so request the Trustee shall, by notice in writing addressed and mailed to the Power Company at Cleveland, Ohio, declare the principal of all the bonds to be due and payable, and thereupon the same shall forthwith become and be due and payable. This provision, however, is subject to the condition that if at any time after the principal of such bonds shall have been so declared due and payable and before

any sale of the mortgaged premises shall have been made, all arrears of interest upon all the bonds and all other amounts in respect of which the Power Company shall then be in default under this indenture, other than the principal of the bonds, shall, together with the expenses and reasonable charges of the Trustee, either be paid by the Power Company or be collected out of the mortgaged premises, and any other defaults hereunder shall be cured, then and in every such case the holders of a majority in amount of
74 the bonds then outstanding may by written notice to the Trustee direct the Trustee to waive such default and its consequences, and the Trustee upon receiving such notice shall waive such default and its consequences by written notice to the Power Company, and the parties hereto shall thereupon be restored to their former position and rights hereunder, but no such waiver shall extend to or affect any subsequent default or impair any rights consequent thereon.

Article X.

In case default shall be made in the payment of the principal of any of the bonds hereby secured when the same shall become due and payable according to their terms and such default shall continue for a period of thirty days, or in case the principal of said bonds shall be declared due and payable in accordance with the terms of the preceding article, then and in each such case the Trustee personally or by attorneys, may enter in, into and upon and take possession of the mortgaged premises and each and every part thereof, and may exclude the Power Company therefrom, and have and hold the same, and use, operate, manage and control the mortgaged premises, execute any and all contracts, leases and undertakings, and in general conduct and carry on the business of the Power Company as fully as it could do if in possession thereof, and exercise all lawful franchises and powers of the Power Company; and the Trustee, to the extent permitted by law, shall also be entitled to take possession of all cash, accounts receivable, securities and supplies of the Power Company then on hand, and of the accounts, books, records and affairs of the Power Company and to hold and dispose of the same as part of the security for
75 the bonds hereby secured and then outstanding with the same force and effect as if the same were specifically described in the granting and pledging clauses of this indenture; and the Trustee in either of the events aforesaid may also institute and prosecute any suit, action or proceeding and take any and every other remedy at law or in equity as may be authorized by law to enforce the rights of the bondholders and apply to the payment of the bonds outstanding hereunder the property hereby pledged and conveyed for the security thereof. The Trustee is further authorized at all times, either before or after default, to institute and prosecute any and every action, suit or proceeding authorized by law which in his discretion may be necessary and proper for the protection and preservation of any and every part of the property, rights, powers, privileges and franchises hereby conveyed to him.

Article XI.

No holder of any bond hereby secured shall have any right to institute any suit, action or proceeding at law or in equity for the foreclosure of this indenture, or for the execution of any trust hereof or for any other remedy hereunder, unless such holder shall have previously given to the Trustee written notice of a default and a continuance thereof as hereinbefore provided, nor unless the holders of a majority in amount of the bonds hereby secured and then outstanding shall have made written request upon the Trustee and shall have offered him a reasonable opportunity either to proceed to exercise the powers hereinbefore granted or to institute such action, suit or proceeding in their own names, nor unless
76 also they shall have offered to the Trustee security and indemnity satisfactory to him against the costs, expenses and liabilities to be incurred therein or thereby, and such notification, request and offer of indemnity are hereby declared in each and every such case, at the option of the Trustee, to be conditions precedent to the execution by him of the powers and trusts in this indenture and to any action or cause of action for foreclosure or for any other remedy hereunder. But the Trustee may in his discretion exercise any and every right herein conferred upon him without being so notified or requested by the bondholders.

Article XII.

No recourse under or upon any obligation, covenant or agreement of this indenture, or upon any bond hereby secured, shall be had against any incorporator, stockholder, director or officer of the Power Company, past, present or future, or of any successor corporation, or any corporation in which the Power Company may be merged or consolidated, either directly or through the Power Company, or any other such corporation, by the enforcement of any assessment, penalty or contractual obligation, or by any legal or equitable proceedings by virtue of any statute or otherwise, it being expressly agreed and understood that this indenture and the obligations hereby secured are solely corporate obligations and that no personal liability whatsoever shall attach to or be incurred by the incorporators, stockholders, directors or officers of the Power Company, past, present or future, or of any successor corporation or corporations into which the Power Company may be consolidated
77 or merged, or any of them, because of the incurring of the indebtedness hereby authorized or under or by reason of any obligations, covenants or agreements contained in this indenture or in any of the bonds hereby secured or implied therefrom, and that any and all personal liability of every name and nature, either at common law or in equity, or by statute or constitution, of every such incorporator, stockholder, director or officer is hereby expressly waived as a condition of and in consideration for the execution of this indenture and the issuing of such bonds.

Article XIII.

The Trustee shall be under no responsibility for the validity of this instrument or for the execution or acknowledgment thereof or for the validity of any of the bonds issued hereunder, nor shall he be in anywise responsible for the breach of any covenant hereof of the Power Company.

It shall be no part of the duty of the Trustee to file or record this indenture, or do any other act which may be necessary to be done for the continuance of the lien hereof, or for the giving of notice of the existence of any such lien, or for extending or supplementing the same. The Trustee shall not be liable for the exercise of any discretion or power hereunder or mistake or errors in judgment, nor shall he be answerable for the acts or defaults of any other person in connection with such trust, nor otherwise liable except for his own wilful misconduct or gross negligence.

The Trustee may select and employ in and about the execution of this trust suitable agents and attorneys, whose reasonable compensation shall be a charge upon the mortgaged premises and the income and proceeds thereof paramount to the bonds.

78 The Trustee shall not be personally liable for any debt contracted by him nor for damages to person or property injured nor for salaries or non-fulfillment of contracts during any period or in any matter in which the Trustee is performing any of the duties or powers imposed or conferred upon him by this indenture.

The Trustee may be removed at any time by an instrument or concurrent instruments in writing signed by the holders of not less than a majority in amount of the bonds hereby secured and then outstanding.

The Trustee may resign and be discharged from the trust hereby created by delivering to and filing with the Power Company his written resignation and giving notice by mail of such resignation to each then registered holder of the bonds secured hereby; such resignation, however, shall not take effect for ten days after the filing of the same with the Power Company and the mailing of the notices to the bondholders as herein provided.

In case the Trustee shall die, resign or be removed or otherwise become incapable of acting, a successor may be appointed by the holders of a majority in amount of the bonds secured hereby and then outstanding, by an instrument or concurrent instruments, signed by such bondholders or their attorneys in fact duly authorized; provided, nevertheless, and it is hereby agreed and declared, that in case at any time there shall be a vacancy in the office of Trustee hereunder the Power Company by an instrument executed by order of its Board of Directors may appoint a Trustee to fill such vacancy until a new Trustee shall be appointed by the bondholders as herein authorized. The Power Company shall give writ-

79 ten notice by mail of any such appointment by it to the then registered holders of the bonds secured hereby.

In case of the death, resignation, removal or other incapacity of

any successor Trustee so named by either the bondholders or the Power Company a new Trustee may be appointed in the manner hereinabove provided for the appointment of a Trustee in the place of the present Trustee, and every Trustee hereafter appointed as Trustee under this indenture in the manner herein provided shall have all the rights and powers and be subject to the duties imposed and conferred upon the Trustee named herein.

Article XIV.

Nothing in this indenture expressed or implied is intended or shall be construed to confer upon any person, firm or corporation, other than the parties hereto and the holders of the bonds issued under and secured by this indenture, any right, remedy or claim, legal or equitable, under or by reason of this indenture, all of its covenants, conditions and stipulations being intended to be and being for the sole and exclusive benefit of the parties hereto and of the holders from time to time of the bonds hereby secured.

Article XV.

All of the covenants, stipulations, terms, undertakings and agreements herein contained by or on behalf of the Power Company shall bind its successors and assigns, whether so expressed or not.

80

Article XVI.

This indenture may be executed in counterparts and each counterpart executed by the parties hereto shall for all purposes be deemed to be an original.

Article XVII.

Forthwith upon the execution and delivery of this indenture and before the bonds provided for herein are actually issued, all existing notes of the Power Company which are exchangeable for bonds to be issued hereunder and all existing rights of the holders of said notes to demand and receive bonds to be issued hereunder shall become and be secured by the lien created by this indenture upon all of the property hereby conveyed and become and be entitled through the Trustee to all the rights conferred by this indenture upon the holders of the bonds to be issued hereunder.

In witness whereof, The Cuyahoga River Power Company by its officers thereunto lawfully authorized has hereunto set its corporate name and seal as of the day and year first above written.

THE CUYAHOGA RIVER POWER COMPANY,
By WILLARD R. KIMBALL, *President.*

Attest:
LOUIS ENGLANDER, *Secretary.*

Signed and acknowledged in the presence of
J. W. WILLIAMS.
M. TARABA.

81 STATE OF OHIO,
County of Cuyahoga:

On this 15th day of July, A. D. 1915, personally appeared before me, a Notary Public within and for said County, in the State aforesaid, Willard R. Kimball, to me known and known to me to be the President of The Cuyahoga River Power Company, the corporation which executed the foregoing instrument, who duly acknowledged that he did sign and seal said instrument, as such President, for and on behalf of said corporation, and that the same is his free act and deed as such President, and the free and corporate act and deed of said The Cuyahoga River Power Company.

In witness whereof, I have hereunto set my hand and official seal at the City of Cleveland, County of Cuyahoga, this — day of July, A. D. 1915.

DAVID A. CHRISTOPHER.

THE STATE OF OHIO,
Cuyahoga County, ss:

On this 15th day of July, A. D. 1915, before me personally came Louis Englander, to me known, who, being by me duly sworn, did depose and say, that he resided in the City of Cleveland, County of Cuyahoga; that he is the Secretary of The Cuyahoga River Power Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

DAVID A. CHRISTOPHER.

82 *Defendant's Motion to Dismiss Bill.*

District Court of the United States, Northern District of Ohio, Eastern Division.

JOHN H. SEARS, Plaintiff,
v.
THE CITY OF AKRON, Defendant.

Motion to Dismiss.

Now comes the City of Akron, the defendant in the above entitled cause and moves that the plaintiff's bill of complaint be dismissed and for causes therefore sets forth the following:

1. Because it does not appear from the allegations contained in the plaintiff's bill of complaint that this Court has jurisdiction of this cause.

2. Because it appears from the allegations contained in the plaintiff's bill of complaint, that this Court is without jurisdiction of this cause.

3. Because it appears from the allegations contained in the plaintiff's bill of complaint that the Cuyahoga River Power Company, a corporation incorporated under and pursuant to the laws of the State of Ohio, is a necessary and indispensible party to this cause and that said Cuyahoga River Power Company has not been made a party hereto.

83 4. Because it appears from the allegations contained in the plaintiff's bill of complaint, that the Cuyahoga River Power Company, a corporation incorporated under and pursuant to the laws of Ohio, is a necessary and indispensible party plaintiff to this cause, and that if said Cuyahoga River Power Company be joined hereto as party plaintiff, this controversy is not a controversy between citizens of several states, nor a controversy arising under the laws and Constitution of the United States, and that this Court is without jurisdiction thereof.

5. Because it appears from the allegations contained in the plaintiff's bill of complaint, that the bringing of said cause in the name of the plaintiff as sole plaintiff, instead of in the name of the Cuyahoga River Power Company, a corporation incorporated under the laws of the State of Ohio, or instead of joining said Cuyahoga River Power Company as co-plaintiff herein, is a fraud upon the Court and a pretense that said cause is a controversy between citizens of different states, whereas, as appears by said bill of complaint, the cause of action alleged therein is a controversy between the said Cuyahoga River Power Company and the City of Akron and between citizens of the State of Ohio, that the interest of the plaintiff is inseparable from the interest of said Cuyahoga River Power Company, that said suit is brought solely for the purpose of reopening in this Court, controversies heretofore decided in the Courts of the State of Ohio and in this Court, that no controversy is alleged arising under the laws and Constitution of the United States, and this Court has no jurisdiction thereof.

6. Because it appears from the allegations contained in the
84 plaintiff's bill of complaint that the plaintiff brings this bill as assignee of a chose-in-action from the Cuyahoga River Power Company, a corporation organized under and pursuant to the laws of the State of Ohio, and that said Cuyahoga River Power Company could not have prosecuted said suit in this Court if no assignment had been made and that this Court has no jurisdiction thereof.

7. Because it appears from the allegations contained in the plaintiff's bill of complaint, that the cause of action alleged therein is not a controversy between citizens of different states or arising out of the laws and Constitution of the United States, and that this Court has no jurisdiction thereof.

8. Because the bill of complaint states no cause for equitable relief.

9. Because the bill of complaint shows no contract of the plaintiff impaired, or property, right, or interest of the plaintiff injured or threatened to be injured by acts of the defendant.

10. Because it does not appear from the allegations of the plaintiff's bill of complaint, that the defendant has committed or threat-

ened any unlawful act which has resulted or will result in injury to the plaintiff.

11. Because it appears from the allegations of the plaintiff's bill of complaint, that all the plaintiff's right, title and interest in the premises are based upon an assignment and transfer from the Cuyahoga River Power Company, a corporation organized under and pursuant to the laws of the State of Ohio and that said Cuyahoga River Power Company has been guilty of laches in the premises.

85 12. Because it appears from the allegations of the plaintiff's bill of complaint, that the plaintiff has a full, complete and adequate remedy at law.

THE CITY OF AKRON,
By —— ——, *Solicitor.*

86 *Opinion of Judge Clarke.*

In the United States District Court, Northern District of Ohio Eastern Division.

No. 310.

JOHN H. SEARS, as Trustee, Plaintiff,
vs.
THE CITY OF AKRON, Defendant.

Memorandum Opinion.

CLARKE, *District Judge:*

This cause came on for hearing upon motion to dismiss the bill of complaint and was submitted to the court on briefs.

Stated in very general terms the claim of the bill is that the plaintiff is a trustee for the bondholders under a mortgage claimed to have been issued by the Cuyahoga River Power Company dated July 13th and acknowledged on July 15, 1915.

The plaintiff claims that the power company "by appropriate corporate resolution" on June 8, 1908 adopted a plan called the "plan of the Roberts Abbott Company," which definitely located on designated lands proposed improvements for the generating and transporting of electricity, including a large dam and various

87 reservoirs, which action the bill claims "appropriated" to the use of the company, the water of the Cuyahoga River and apparently its adjacent banks for many miles.

Later, on April 23, 1909, the company adopted an amended plan of procedure called the "Von Schon Plan," covering with its blanket scheme a much greater extent of territory.

The purposes of the Power Company as stated in the twelfth paragraph of the bill are sweeping in character involving the construction of a series of dams in the Cuyahoga River, Tuscarawas River, Mud Brook, Brandywine and Tinkers Creeks and tributaries of each

of these, being situated in Cuyahoga, Medina, Summit, Portage, Stark, Geauga, Tuscarawas and adjacent counties in the State of Ohio, and it is added that the purpose is to construct and maintain canals, locks and raceways to regulate and carry the head of water which it is proposed to obtain from the various designated streams to power houses and thence to distribute to consumers the electricity which it is proposed to generate.

It is stated that the character of the improvements proposed is such that they are not to be located at any single place, and therefore the eastern terminus of the projected plan is designated to be at or near the village of Burton Station in Geauga County, and its southern terminus at or near Canal Dover in Tuscarawas
88 County. It may be noted that this scheme covers the water and water sheds of w[illegible] must largely exceed 100 miles of the rivers and streams of northeastern Ohio.

The bill alleges diligent conduct on the part of the Power Company during the years between its organization on May 28, 1908 and the filing of the bill in this case on July 24, 1915, but its chief industry, as the court gathers it from the bill, appears to have been making surveys and making claims against the city of Akron for invasion of what it claimed to be its rights, until the execution of the mortgage dated July 13-15, 1915, under authority of which the plaintiff sues.

It is alleged that on May 7, 1912, the Power Company duly located and adopted by corporate resolution specific surveys and described each parcel of land necessary in the execution of its plan and the claim is added that by the corporate action thus taken adopting specific surveys and descriptions of the lands required for carrying out its projects, the Power Company acquired and became possessed of a valid right and franchise to construct and maintain upon the lands and waters embraced within the descriptions so adopted as aforesaid, the reservoirs, dams, power houses and other appurtenances requisite for the development of hydro-electric power in accordance with the plans adopted by it, and to acquire and utilize said parcels of land for the accomplishment of its objects and purposes and from and after the time of the adoption by said company of said descrip-
89 tions of said parcels of land, it is claimed the lands and waters embraced within said descriptions were and ever since have been and now are legally and equitably subject to said company's franchise.

Thus the claim of the plaintiff is that by this entirely private corporate action of the Power Company and without any payment to or even notice to the owners of the land over which it resolved to operate, it acquired an equitable right to use the parcels of land designated in its private records as necessary for its purposes, which right it now prays this court to protect against invasion threatened by the city of Akron, under the circumstances stated in the bill, which will be stated later on in this opinion.

It should be added that the bill shows that the Power Company claims to have acquired during the years between 1908 and 1915 a small piece of property—approximately a quarter of an acre of

land—and a more or less indefinite right to a short stretch of the bed of the Cuyahoga River and indefinitely described options upon other indefinitely described properties.

The plaintiff sues as trustee for the bondholders under the mortgage referred to dated July 13-15, 1915, to secure bonds of an aggregate face value of $150,000, which bonds the mortgage, made a part of the bill, declares were issued to pay for money borrowed and services contracted for in the month of April 1909. By this
90 mortgage, title was conveyed to the trustee in all of the lands which the Company claims to own, and in certain options which it claims to have acquired.

The action of the city of Akron of which complaint is made is that beginning with the securing of the passing of a bill by the Ohio General Assembly on May 17, 1911 that city by various proceedings of its council and officials acquired territory and constructed an extensive dam or reservoir to supply its inhabitants with water from the Cuyahoga River.

The bill was filed on July 24, 1915 and it is alleged that the defendant had announced its intention of diverting the waters of the Cuyahoga River to the use of its inhabitants on the first day of August 1915, in violation of the rights, property and franchises of the Power Company.

There is no allegation that any part of the land which the Power Company owns is actually invaded by any of the constructions of the defendant, and the real substance of the complaint is that the Power Company's project of utilizing the waters of the Cuyahoga River and many other streams for many miles will be impaired by the city's use of the water of the river as threatened.

In addition to all this, it is alleged that the city of Akron is without funds and is financially unable to pay any damages which may be caused to the Power Company, if it is not restrained from
91 the use of the dams and reservoirs which it has constructed, and that all that the city has done in providing for the use of the waters of the Cuyahoga River has been done in bad faith and fraudulently for the benefit of certain individuals and private corporations, and not for the benefit of its inhabitants generally.

These allegations with respect to the insolvency of the city of Akron and the fraudulent conduct of its officers are mere conclusions of the pleader without any facts being stated to support them, and therefore, though this motion to dismiss admits as true all allegations which are well pleaded, they can serve no useful purpose in making the case one in equity if without them it would be one at law for damages. Even if the law on this point were different from what I have stated it to be, this court would refuse in obedience to any technical rule to accept as true any such allegations. The city of Akron is not insolvent, but is abundantly able to pay, and in the judgment of this court desires to pay any claims which it may justly owe, and it is impossible to believe that the many public officials who must have participated in the construction of the great public work under consideration in this case can have been false to the trust

imposed in them for many years by the community in which they lived.

Under the state of facts thus alleged in the bill, this court is clearly of the opinion that the Power Company, by the mere adoption by its Board of Directors of a plan of its proposed im-
92 provement, did not acquire as against the city of Akron any interest whatever, legal or equitable in the lands and waters used or intended to be used by it in providing a water supply system for its inhabitants.

In Ohio the declaration upon the private records of a corporation of an intention to construct an improvement upon or over any lands without further action taken, or payment made does not give to the plaintiff any title or right whatever legal or equitable in the lands embraced within such paper scheme. This is distinctly the settled law of Ohio, and the best expression of it is, I think, to be found in the case of Columbus etc. Co. vs. T. & O. C. Ry. Co., 32 W. L. B. 186. This is a Common Pleas court decision, but it is well worked out and the absence of decision by higher courts on a question which must have frequently arisen is of itself strongly confirmatory of its authority as an expression of the accepted law of the state. The court says:

"But the grant, by articles of incorporation to a railroad company of a right to construct a road is afloat; it attaches to no specific lands until the line of the road is sufficiently fixed by purchase of the land, or by condemnation proceedings and acceptance of the land condemned. Even after the land is condemned the Railroad Company may elect not to pay the price and accept the land. The fact that a Railroad Company has surveyed and staked a line upon certain grounds does not conclude it, why then should it conclude anybody else? The company may survey and stake more than one line and by comparing the cost and advantages of each of them, determine upon which it will build, but the line is not definitely established until the land is condemned, paid for or accepted, or purchased by agreement."

93 So in State of Ohio, ex rel. v. Cincinnati, 17 O. S. 103, the court states what is well known to this court to be the opinion of the profession of the state that "no appropriation of lands of the relators could be completed, no title from them could be acquired and no incumbrance could be imposed on their estate by the railroad company until the amount of compensation fixed by the findings of the jury was paid in money or secured to be paid, by a deposit in money."

The plaintiff has no power of eminent domain greater or other than a railroad company has. In the State of Ohio there is not now and never has been any statute requiring a corporation desiring to exercise the right of eminent domain to file in any public office a map or survey of the route or plan of the improvement adopted by the Company, so that the rule that land owners or other corporations are in any wise estopped or their property encumbered by the mere private resolution of a company possessing the power of eminent domain has never prevailed in this state as it has in some other states. Grave constitutional questions are argued in the briefs filed in support of

this bill to the effect that the use of land by the city of Akron and of the water supply of the Cuyahoga River, which the plaintiff claims it appropriated to itself by adopting upon paper its grandiose scheme, offend against the constitution of the State of Ohio and of the United States by the taking of the plaintiff's property without due process of law.

94 The sufficient answer to these claims is to be found in the decision of the Supreme Court of the United States in Ramapo Water Company v. The City of New York, 236 U. S. 579, in which the court, passing upon a case strikingly similar in many respects to the one at bar says:

"The District Court, being of opinion that the bill disclosed no such rights as the plaintiff claimed, and therefore showed no real constitutional ground, dismissed the bill. The plaintiff's argument, while admitting that it must appear that there is a substantial question under the Constitution, and that the formal averment of such a question is not enough, makes a rather useless attack upon the application of that principle in Underground Railroad v. New York, 193 U. S. 416. If it is apparent that the bill is groundless, it does not matter very much whether the dismissal purports to be for want of jurisdiction, or on the merits. But we are of opinion that the groundlessness of the bill is so obvious that it fairly may be said that no substantial constitutional question appears."

Since the bill in this case does not show any substantial property, legal or equitable in the plaintiff which is invaded by the defendant, it is obvious that it is not important to consider constitutional questions which it is claimed are involved in the case.

It is perhaps not improper to note that the counsel for the appellant in the case last cited appears as the solicitor for the plaintiff in this case and files an elaborate brief in support of substantially the doctrine which was rejected with such emphasis by the Supreme Court in that case.

What we have said sustains the motion to dismiss the bill, but another view of the case presses insistently upon the attention of the court. The bill was filed on the 24th day of July 1915, and it

95 is alleged therein that the city of Akron was threatening to divert the waters of the Cuyahoga River to its use on the first day of August 1915. It also appears from the bill that the capacity of the water works which the city had constructed was 194,000,000 gallons a day. If the court had no other knowledge than these allegations, it would be plain that the city of Akron has been for many years engaged in the construction of this water supply system and that it must have cost many millions of dollars.

It is alleged in the bill that the company for which the plaintiff is trustee on July 14, 1915 (1913) filed a bill in this court praying for an injunction on substantially the same grounds as those stated in this cause which bill was dismissed for want of jurisdiction, and that an appeal from that decision is now pending in the Supreme Court of the United States, and it is also alleged that various futile attempts to compromise with the city of Akron were made by the plaintiff. The mortgage under which the plaintiff was trustee is by

reference made a part of the bill, and it recites that it was given to secure the payment of money borrowed and services contracted for in the month of April 1909. Persons so interested in the affairs of the Power Company as such creditors must have been, must have known of the prior attempt in this court to enjoin the city of Akron from going forward with its water supply construction, and must have known also that the city was expending large sums of money in providing for that water supply. The trustee whose rights
96 cannot rise higher than those of the creditors he represents, did not begin this suit, until as we have said, within six days of the time when the city had announced that it was about to make use of the completed construction which must have cost a very large sum of money.

These facts must be taken into consideration when a chancellor is asked to enjoin a great public improvement, and by his order inconvenience the inhabitants of a city with approximately 100,000 inhabitants.

Such a state of facts makes sharply applicable the decision of the Supreme Court of the United States in New York City v. Pine, 185 U. S. 93, a case with many features not greatly different from the one at bar. Here the plaintiff sought to enjoin the city of New York from the use of the water of a river after it had expended a large sum of money in providing for use of such water. The court discussing elaborately the law applicable to such a state of facts, says:

"The time at which parties invoke the aid of a court of equity is often a significant factor in determining the extent of their rights, Vigilantibus non dormientibus æquitas subvenit is a maxim of equity." (p. 98). * * * The court quotes with approval from Smith v. Clay, 3 Brown Ch. 639, as follows:

"'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience good faith and reasonable diligence.'"

The review of many cases is concluded as follows, viz.:

"From these authorities it is apparent that the time at
97 which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted. If one, aware of the situation, believes he has certain legal rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights, but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted for the right waived—especially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to enforce those rights, and in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal."

It is decided in Sullivan v. Portland, etc. R. R. Co., 94 U. S. 806, that a court of its own motion may take notice of the laches of the

plaintiff and refuse the relief prayed for, and therefore for the reason that the persons represented by the plaintiff have slept upon their rights if any they had or have, this court refuses to grant the injunction prayed for, because such an order would largely affect the convenience and welfare of a large community.

An order will be entered in accordance with this opinion sustaining the motion to the bill and dismissing the suit.

(Sgd.) JOHN H. CLARKE, *Judge.*

Cleveland, Ohio, January 7, 1916.

98 *Decree Appealed From.*

At a Stated Term of the United States District Court for the Northern District of Ohio, Eastern Division, held in and for said District at the Court House thereof at the City of Cleveland, State of Ohio, on the — day of January, 1916.

Present: Hon. John H. Clarke, District Judge.

JOHN H. SEARS, as Trustee, Plaintiff,
against
THE CITY OF AKRON, Defendant

Decree Dismissing Bill.

This cause came on to be heard upon the bill of complaint and the motion of the defendant to dismiss the same, and was argued by counsel; thereupon, upon consideration thereof it was

Ordered, adjudged and decreed, that said motion be and the same is hereby granted, and that said bill of complaint be and the same is hereby dismissed, and the plaintiff is ordered to pay the costs hereof, for which judgment is rendered against him.

Enter.

(Signed) JOHN H. CLARKE,
United States District Judge.

Jan. 25, 1916.

99 *Petition for and Allowance of Appeal.*

District Court of the United States, Northern District of Ohio, Eastern Division.

JOHN H. SEARS, as Trustee, Plaintiff,
against
THE CITY OF AKRON, Defendant.

The above named plaintiff, feeling himself aggrieved by the decree entered herein on the 25 day of January, 1916, dismissing the

bill of complaint herein, does hereby appeal from said decree to the Supreme Court of the United States and prays that his appeal may be allowed and that a citation may issue directed to the defendant above named and that a duly authenticated transcript of the record and proceedings upon which said decree was made may be transmitted to said Supreme Court of the United States.

Dated, January 25, 1916.

CARROLL G. WALTER,
Solicitor for Plaintiff.

Office and Post Office Address: 55 Wall Street, Borough of Manhattan, City of New York.

Now on this 25 day of January, 1916, it is ordered that the foregoing petition for appeal be and it hereby is allowed, and that a citation be issued as prayed for and that the Clerk certify the record and proceedings according to the prayer of said petition, bond to be given in the sum of two hundred fifty dollars.

JOHN H. CLARKE,
United States District Judge.

100 *Assignment of Errors.*

District Court of the United States, Northern District of Ohio, Eastern Division.

JOHN H. SEARS, as Trustee, Plaintiff,
against
THE CITY OF AKRON, Defendant.

Now comes the plaintiff above named, by his solicitor, and presents with his accompanying petition for appeal from the decree entered herein on the 25 day of January, 1916, the following assignment of errors upon which he will rely upon his appeal from said decree, to wit:

1. The Court erred in granting the defendant's motion to dismiss the bill of complaint.

2. The Court erred in refusing to hold that the plaintiff's mortgagor, The Cuyahoga River Power Company, has a valid, existing contract with the State of Ohio by which said State granted the rights, powers, privileges and franchises expressed in the charter of said company.

3. The Court erred in refusing to hold that the plaintiff's mortgagor has acquired by grant from the State of Ohio and now owns, holds and possesses a prior and exclusive right, power and franchise to appropriate and use, and that it has in fact duly appropriated, the waters of the Cuyahoga River and the lands to which the same are appurtenant, to the extent necessary and convenient for the execution of its corporate purposes of developing and furnishing
101 hydro-electric power for a public use.

4. The Court erred in refusing to hold that the acts and

proceedings of the defendant set forth in the bill constitute an impairment of the obligation of the aforesaid contract, grant, and franchise, in violation of Section 10 of Article I. of the Constitution of the United States.

5. The Court erred in refusing to hold that said Power Company's location of its right of way is property within the meaning and protection of the Constitution of the United States and the Fourteenth Amendment thereof.

6. The Court erred in refusing to hold that the acts and proceedings of the defendant set forth in the bill constitute a taking and deprivation of said property in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

7. The Court erred in refusing to hold that the plaintiff's mortgagor is the owner of tangible real estate and of riparian rights incident thereto which are being or about to be taken by the defendant without compensation and without due process of law in violation of the Constitution of the United States.

8. The Court erred in refusing to hold that the acts and proceedings of the defendant set forth in the bill, particularly its taking of all the waters of the Cuyahoga River, constitute a taking of the property of the plaintiff's mortgagor for a private use and not for a public use in violation of the Constitution of the United States.

9. The Court erred in refusing to hold that the defendant's act in attempting to take and divert all the waters of the Cuyahoga River is an unreasonable and an unnecessary interference with property already devoted to a public use and is not in good faith but
102 collusive and fraudulent.

10. The Court erred in refusing to hold that the defendant's failure and inability to pay compensation for the property of the plaintiff's mortgagor taken by the defendant constitutes a taking of the property of the plaintiff's mortgagor in violation of Section 19 of Article I. of the Constitution of the State of Ohio, and also a taking of the property of the plaintiff's mortgagor without due process of law, in violation of the Constitution of the United States and the Fourteenth Amendment thereof.

11. The Court erred in refusing to hold that the defendant has no lawful right or authority to take or appropriate the property of the plaintiff's mortgagor and no legal right or authority to take or appropriate the waters of the Cuyahoga River.

12. The Court erred in holding that there has been any such laches as would justify a dismissal of the bill or a denial of an injunction.

13. The Court erred in refusing to hold that upon the facts alleged in the bill the plaintiff was entitled to the relief prayed for therein.

Wherefore and for divers other reasons the said plaintiff prays that the said decree may be reversed and that the District Court of the United States for the Northern District of Ohio, Eastern Division, be directed by the mandate of the Supreme Court of the United States to enter a decree denying the defendant's motion to dismiss the bill and adjudging that the bill sets forth a valid cause of action

in equity arising under the Constitution of the United States;
103 and for such other, further and general relief as to the Court may seem proper.

Dated, January 25, 1916.

CARROLL G. WALTER,
Solicitor for Plaintiff.

Office and Post Office Address: 55 Wall Street, Borough of Manhattan, City of New York.

104 UNITED STATES OF AMERICA, *ss:*

To the City of Akron, a Municipal Corporation of the State of Ohio, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington within thirty days of the date hereof pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Ohio, Eastern Division, wherein John H. Sears, as Trustee, is appellant and the City of Akron is appellee, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected, and why speedy justice should not be done in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 25th day of January, in the year of our Lord one thousand nine hundred and sixteen.

JOHN H. CLARKE,
United States District Judge.

Service of the foregoing citation, together with a copy of the petition for and the allowance of the appeal therein referred to, the assignment of errors accompanying the same, and of the bond on said appeal, is hereby admitted this 27th day of January, 1916.

SCOTT KENFIELD,
Solicitor for Defendant.

105 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the City of Akron, a Municipal Corporation of the State of Ohio, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington within thirty days of the date hereof pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Ohio, Eastern Division, wherein John H. Sears, as Trustee, is appellant and the City of Akron is appellee, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected, and why speedy justice should not be done in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of

the United States, this 25 day of January, in the year of our Lord one thousand nine hundred and sixteen.

JOHN H. CLARKE,
United States District Judge.

Service of the foregoing citation, together with a copy of the petition for and the allowance of the appeal therein referred to, the assignment of errors accompanying the same, and of the bond on said appeal, is hereby admitted this 27 day of January, 1916.

SCOTT KENFIELD,
Solicitor for Defendant.

106 *Præcipe for Record.*

District Court of the United States, Northern District of Ohio, Eastern Division.

JOHN H. SEARS, as Trustee, Plaintiff,
against
THE CITY OF AKRON, Defendant.

To the Clerk of the Court Above Named:

Pursuant to Rule 8 of the Supreme Court of the United States plaintiff herein hereby indicates the following as the portions of the record to be incorporated into the transcript of record on the appeal taken by the plaintiff from the decree dismissing the bill of complaint herein, viz:

1. Bill of complaint and the exhibit thereto annexed.
2. Defendant's motions to dismiss the bill of complaint.
3. Opinion of Judge Clarke dated January 4, 1916.
4. Final decree dismissing bill.
5. Petition for and allowance of appeal.
6. Assignment of errors.
7. Citation on appeal.

Dated, January 25, 1916.

Yours, etc.,

CARROLL G. WALTER,
Solicitor for Plaintiff.

55 Wall Street, Borough of Manhattan, City of New York.

Service of a copy of the foregoing præcipe is hereby admitted this 25 day of January, 1916.

SCOTT KENFIELD,
Solicitors for Defendants.

107 District Court of the United States, Northern District of Ohio, Eastern Division.

JOHN H. SEARS, Plaintiff,
against
THE CITY OF AKRON, Defendant.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled suit as agreed on by the parties.

Dated, February 8, 1916.

CARROLL G. WALTER,
Solicitor for Plaintiff.
S. H. TOLLES,
Solicitor for Defendant.

108 UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, ss:

No. 310. Equity.

JOHN H. SEARS, as Trustee,
vs.
THE CITY OF AKRON.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the United States District Court, within and for said District, do hereby certify that the foregoing is a full, true and correct transcript of the final record in the above entitled cause, in accordance with the precipe filed by the appellant, John H. Sears, as Trustee, and the stipulation herein.

There is also annexed to and transmitted with such record, the original citation issued and allowed in this cause.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court at Cleveland in said District, this 14th day of February, A. D. 1916, and in the 140th year of the Independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk,*
By R. C. DEAN, *Deputy Clerk.*

Endorsed on cover: File No. 25,142. N. Ohio D. C. U. S. Term No. 859. John H. Sears, trustee, appellant, vs. The City of Akron. Filed February 19th, 1916. File No. 25,142.

Supreme Court of the United States,

OCTOBER TERM, 1915.

JOHN H. SEARS, as Trustee,
Appellant,
against
THE CITY OF AKRON,
Appellee.
No. 859

Motion to Advance.

Now comes the appellant above named and moves the Court to advance this cause and set the same down for argument.

The following is a brief statement of the facts and matter involved and of the reasons for the application:

This is an appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division, and is taken directly to this Court under those provisions of Section 238 of the Judicial Code which authorize such direct appeals

> "in any case that involves the construction or application of the Constitution of the United States"

and

> "in any case in which the Constitution or

> law of a state is claimed to be in contravention of the Constitution of the United States."

The appellant is the Trustee under a mortgage executed by The Cuyahoga River Power Company, and the suit was brought to enjoin the appellee from taking the mortgaged premises (including riparian lands, the Power Company's right of way, and its franchises) for a private use and without compensation, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, the bill alleging, also, that the acts complained of are being done under color of authority of State laws and amount to an impairment of the obligations of the Power Company's contracts with the State of Ohio (*i. e.*, grants of a right of way and other franchises to the Power Company), in violation of Section 10 of Article I of the United States Constitution. The specific relief sought is an injunction preventing the appellee from taking and diverting the water of the Cuyahoga River to the destruction of a conflicting public use to which the waters have been previously subjected by the Power Company.

The appellant and appellee are citizens of different states, but the jurisdiction of the Court below was invoked, not only upon the ground of such diversity of citizenship, but, also, upon the ground that the case is one arising under the Constitution of the United States.

The appellee moved to dismiss the bill upon the grounds, among others, that no federal question was involved and that the bill did not state facts sufficient to constitute a valid cause of action in equity. The District Court granted this motion and entered a final decree dismissing the bill.

The suit was commenced in July, 1915, and the decree appealed from was entered in January, 1916.

The main facts of the controversy and a number of the questions involved in this case are similar to, if not identical with, those argued in Case No. 465 of this term, entitled *The Cuyahoga River Power Company* v. *City of Akron*, which was advanced upon motion and argued in this Court on October 20, 1915, and is now pending undetermined. The present case, however, presents these important differences: (1) Since the institution of the suit brought by The Cuyahoga River Power Company, that company has further proceeded with its undertaking and has acquired absolute title to some of the parcels of land along the Cuyahoga River necessary for the construction of its plant. (2) The case at bar was heard upon a motion amounting practically to a demurrer for want of equity and the present appeal thus brings up, not merely a question of federal jurisdiction, but all the questions, State and Federal, involved in the merits of the controversy (*Northwestern Laundry* v. *Des Moines*, 239 U. S., 486, 491; cases cited in *McGowan* v. *Parish*, 237 U. S., 285, at p. 292).

Aside from the irreparable injury inflicted upon the appellant by the appellee's practical destruction of the security for the bonds he represents, important public interests are affected by the litigation, viz., the construction of a plant for the conservation of the wasting waters of the Cuyahoga River and the utilization of the same in the development of electric energy for use by the public throughout a large section of the State of Ohio—an enterprise specifically provided for by the State Legislature.

By reason of these facts, as well as on account of the relation of the case to another case already argued before this Court, the appellant submits that this is a case in which a speedy hearing should be had, and an advancement of the case is therefore prayed.

Respectfully submitted,
CARROLL G. WALTER,
Counsel for Appellant.

Notice of Motion to Advance.

Sirs:

Please take notice that the appellant John H. Sears, as Trustee, will submit the foregoing motion to advance to the Supreme Court of the United States at a stated Term thereof on Monday, March 20th, 1916, at the Capitol in the City of Washington, D. C., at the opening of Court on that day, or as soon thereafter as counsel can be heard.

Yours, etc.,
CARROLL G. WALTER,
Counsel for Appellant,
55 Wall Street,
New York, N. Y.

To
Scott Kenfield, Esq.,
City Solicitor,
Akron, Ohio.
S. H. Tolles, Esq.,
Solicitor for Defendant,
Cleveland, Ohio.

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Supreme Court of the United States.

OCTOBER TERM, 1917.

JOHN H. SEARS, as Trustee, Appellant,
against
THE CITY OF AKRON, Appellee.
No. 105.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR APPELLANT.

Statement of the Case.

This is a suit in equity, brought by the appellant as Trustee for bondholders of The Cuyahoga River Power Company, to enjoin the appellee from taking and diverting the waters of the Cuyahoga River, upon the ground that such taking and diversion operates to impair the Power Company's charter and deprive it of its property without due process of law and thereby destroy the security for the bonds.

A motion to dismiss, practically amounting to a demurrer (*Northwestern Laundry* v. *Des Moines*, 239 U. S., 486, 490, 491), was sustained by the District Court and a final decree entered dismissing the bill because no ground for relief was

stated (Decree, Rec., p. 52; Opinion, *id.*, 46). Because of constitutional questions the case is brought here on direct appeal under Section 238 of the Judicial Code. The decree was a general one on the merits and the appeal thus presents all the questions, State and Federal, made upon the face of the bill (*Northwestern Laundry* v. *Des Moines, supra; McGowan* v. *Parish*, 237 U. S., 385, at p. 392, and cases there cited).

Facts.

Apart from the averments with respect to the appellant's title and capacity to sue (sustained by *Old Colony Trust Co.* v. *Omaha*, 230 U. S., 100, 122), the bill is substantially the same as that in *Cuyahoga River Power Co.* v. *Akron*, 240 U. S., 462, *except* that the bill here shows the Power Company's ownership of the fee of one-half of the site for the main diversion dam of the Power Company and about one and one-half miles of river bed, both parcels being below the dam of the city; and also the site for the dam of the principal reservoir and 30 acres of reservoir lands, both above the dam of the city.*

It alleges that the Power Company was incorporated under the laws of Ohio in 1908, for the purpose of generating hydro-electric power by means of dams and canals upon a specifically

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*The case of Cuyahoga River Power Co. v. Akron was brought in July, 1913. A final decree dismissing it for want of jurisdiction was entered by the District Court in July, 1914. The appeal from that decree was argued in this Court October 20, 1915, and the decree was reversed March 20, 1916. This suit was brought in July, 1915, and dismissed in January, 1916. It was thus brought and decided after the Company's case had been dismissed by the District Court and before its decree of dismissal had been reversed by this Court.

described portion of the Cuyahoga River and of disposing of the same; that it has adopted surveys, maps, plans and profiles to that end, and filed copies of the same in the probate courts of Summit and Portage Counties, and various other State courts including the Supreme Court of Ohio, and with the appellee herein as a part of its letter of March 29, 1913 (Rec., p. 19) that it has entered upon, located and defined the property rights required, has instituted condemnation proceedings to acquire each and every parcel of land located within its original grant, and the State Court has decided, as to a part of said lands the descriptions in said petition was "specific" in Northern Realty Co. *v.* Cuyahoga River Power Co., 88 O. S., 616 (Bill, Par. 11), that it has purchased and acquired options upon dam sites, river bed and reservoir lands (Bill, Par. 19); that it has sold bonds and spent large sums, and has gained a paramount and exclusive right to the water and necessary land (Bill, Par. 15). The bill also alleges that *after* these things were done the appellee passed an ordinance appropriating "all the waters of the Cuyahoga River" at and above a certain point designated in the ordinance and directing its solicitor to take proceedings in court for the assessment of the compensation to be paid (Bill, Par. 21, Rec., p. 12); that under this ordinance the appellee has erected a dam at the point indicated; and that its plan is to divert the water from the river and convey it to the City of Akron by means of pipe lines.

It is alleged that the necessary result of this diversion is to deprive the Power Company of its charter, rights, and franchises (and thus destroy the security for the bonds represented by the appellant), in that the ordinance and the proceedings thereunder and the diversion of all the

water is a total destruction of the franchise and property of The Power Company.

Appellee well knew, at the time it passed its ordinance, that the Power Company had obtained its charter and located its plant upon the river and was condemning property for its corporate purposes (Bill, Pars. 28, 19). It was also formally notified, before any work was done under the ordinance, that the enforcement of the ordinance would constitute an illegal interference with the exclusive rights of the Power Company, AND THAT THE LATTER INTENDED TO STAND ON ITS RIGHTS (Bill, Par. 29). The appellee nevertheless went ahead, despite this notification and despite the injunction suit brought by the Power Company as above stated; and in July, 1915, while the appeal from the decree dismissing the company's case was pending in this court, it was officially announced that, appellee's dam being substantially completed, it would commence actual diversion about August 1, 1915 (Bill, Par. 30). Every step of appellee in the purchase of the former supply adequate for thirty-five years, and the abandonment thereof, and in entering upon the Cuyahoga River and constructing its plant, has been with notice of the prior grant, and of the plans of The Power Company, and in the face of its repeated and vehement protest.

The bill further alleges that under the statutes and constitution of Ohio the appellee has no constitutional power to take the property and franchises of the Power Company (Bill, Pars. 23, 24, 25, 27); that the attempt to take *all* the waters of the Cuyahoga River is a taking for a *private use* because the amount taken is ten times as much as the City can possibly consume in any legitimate public purpose (*id.*, Par. 26);

that the City has not instituted any proceedings against the Power Company but is taking and intends to take its property and rights WITHOUT COMPENSATION; and that the financial condition of the City is such that it does not possess and cannot acquire the funds necessary to pay such compensation (*id.*, Par. 32).

These acts of the appellee are alleged to be in violation of Article 1, Section 10, and of the Fourteenth Amendment to the Constitution of the United States (*id.*, Par. 35), and upon that ground an injunction is prayed.

Decision Below, Specification of Errors, Questions Presented.

The question in this case is, when and how does the grant to an Ohio common carrier corporation become definitely fixed?

Appellant contends that if the grant in the charter fixes the termini and the center line of the route, the grant becomes "valid and binding" when the charter is accepted in the manner provided by statute, G. C. Section 8626, and the official service rendered by the Secretary of State is "but another description for the granting of franchises by the State," the most important of which, is the grant of the location. But if the grant is not fixed by the charter it carries with it the right and duty to make it definite, and it becomes valid and binding by survey and adoption.

The general and correct rule, as stated in one of the leading cases, is as follows:

> "The successive steps contemplated by the Act of 1849, and subsequent legislation as necessary to invest the title to the roadway in the corporation are these: First. A preliminary entry on the land of private owners

for the purpose of exploration. This is made by engineers and surveyors who run and mark one or more experimental lines and who report their work with such maps and profiles as may be necessary to present it properly to the company that employs them. Second. The selection and adoption of a line or one of the lines so run as and for the location of the proposed railroad. This is done by the corporation and it *requires the action in some form of the Board of Directors.* This makes what was before experimental and open a *fixed and definite location.* It fastens a servitude upon the property affected thereby, and *so takes from the owner and appropriates to the use of the corporation.* Third. Payment to the owner for what is taken in consequence of the taking, or security that it shall be made when the amount due him is legally ascertained. The title of the owner is not divested until the last of these steps has been taken, as against him the corporation can acquire only a *conditional title* by its act of location, which ripens into an absolute one on making compensation. *As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title.*"

Williamsport, etc., R. R. Co. *v.* Phila. R. R. Co., 141 Pa. St., 407.

We italicize certain portions of the language of the Court in order that their significance may not be overlooked.

The Court below admits the above rule in States where a map is filed in some "public office" (Record, p. 49). But insists that the rule does not apply in Ohio, because—

(1) The grant by articles of incorporation is a "float," and confers no rights "legal or equitable" until every private right, title and interest has been purchased.

The adoption of a survey does not conclude the corporation because, it is claimed, the location may be changed.

(2) The Court finds confirmation for the above theory in the requirement of the Ohio constitution that the ex-propriator must pay in advance before he can take physical possession (Rec., p. 49), and no lien can be placed on the land prior to payment.

(3) The Court further holds that the decision of this Court in Ramapo Water Company *v.* The City of New York, 236 U. S., 579, sustains the decision herein, that the Power Company acquired no rights by incorporation, survey, adoption, condemnation and purchase of private titles.

(4) Finally the Court finds, on the authority of New York City *v.* Pine, 185 U. S., 93, the Power Company has been guilty of laches.

We submit, the obvious errors in the above argument are:

(1) The Ohio statutes permit, but do not require that the grant under a charter shall be a float grant and the first charter of the Power Company shows that the grant was definitely fixed in the following terms:

> "Said company's improvements are to begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River below the City of Akron, Summit County, Ohio, and extend along said Big Cuyahoga River through the County of Summit to a point where said Big Cuyahoga River crosses the line between Summit and Portage Counties" (Bill, Par. 3; Record, p. 2).

The above is a definite location and could be determined by any engineer.

The amended grant (Bill, Par. 12) was not

definitely fixed in the charter, but under G. C. 10128 the Power Company had a vested right to enter, survey and appropriate, all of which it did prior to the entry of appellee (Bill, Par. 14). These surveys were by metes and bounds (Bill, Par. III, pp. 28-35). The State Court has decided they were "specific" descriptions of the property owned by "A. B. & C. R. R. Co. and Henry A. Everett" (Bill, pp. 31-33). Northern Realty Co. *v.* Cuyahoga River Power Co., 88 O. S., 616; hence, by decision of the highest court of the State, this portion of appellant's grant is not a "float" grant.

The provisions of the condemnation statute render it impossible that the grant should become definitely fixed *by purchase,* because G. C. 11042-3 require a description *before* negotiation, and such a description is also required as the foundation for proof of necessity which is one of the preliminary questions to be proven under G. C. 11046 before title can be divested.

Thus the decision denies or repeals the vital franchise of eminent domain.

(2) The exercise of the eminent domain power does not place any new lien or obligation upon the land. The private title is always "subservient to the public welfare," Ohio Const., Art. I, Sec. 19. The power of eminent domain is more than a lien (Lewis Em. Dom., Vol. I, Sec. 1). The Ohio Constitution regards the State as having the dominant title. The same principle is expressed in the New York Constitution (Art. I, Sec. 6) by the words "ultimate title."

Thus the Court again denies the eminent domain power.

(3) The grant in the Ramapo case (*supra*) may have been a float grant. The Court was

inconsistent in citing this case because its major premise is that in any State where a map is filed the map makes the grant. This case was fully argued in Power Co. *v.* Akron, 240 U. S., 462, and possibly this Court did not consider the case in point, because the Ramapo charter had been repealed while the charter of the Power Company is valid and binding.

(4) Laches and the Pine case were also argued in Power Co. *v.* Akron and were not considered applicable.

The question presented is simply whether the grants to the Power Company were valid and binding under the Ohio Laws when accepted in the manner provided by statute.

Since the decree appealed from the learned Judge who wrote below has written the opinion of this Court in *Long Sault Development Co.* v. *Call*, 242 U. S., 272, 276, in which, speaking of an act that authorized the company "to construct, maintain and operate dams, canals, reservoirs and the appurtenances necessary or useful for the purpose of developing water power and electrical energy" *at such point or points on a specified portion of a named river as may be selected by the company*, said:

> "The grants of the Act of 1907 are such that, if it was a valid law, upon their being accepted, they constituted property or contract rights, of which the plaintiff could not be deprived, and which could not be impaired by subsequent legislation."

The State Court has declared the purpose of the Cuyahoga River Power as public, White *v.* Power Co., 77 O. S., 633, and it is not claimed that the charter was not accepted and acted upon in the manner provided by law. The substance of the decision is that the charter is not a con-

tract and the franchises granted by the State are not property.

PART FIRST.

The contract, property and franchises of the Power Company.

A. THE POWER COMPANY'S CHARTER CONSTITUTES A CONTRACT BY WHICH THE STATE GRANTED TO IT A RIGHT OF WAY OVER AND ALONG THE CUYAHOGA RIVER, AND VESTED RIGHT OR FRANCHISE TO CONSTRUCT, MAINTAIN AND OPERATE A HYDRO-ELECTRIC PLANT THEREON.

As far back as 1865, this Court said:

> "We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State Courts, it was that, *an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine.* The security of property rests upon it, and every successful enterprise is undertaken, in the unshaken belief that it will never be forsaken.
>
> "A departure from it *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the Government. An attempt even to reaffirm it, could only tend to lessen its force and obligation."
>
> *The Binghamton Bridge*, 3 Wall., 51, 73, 74.

That this doctrine applies where the charter is obtained by incorporation under general laws as well as where it is obtained by special act of the Legislature, was expressly adjudged in *Piqua Branch State Bank* v. *Knoop*, 16 How., 369, which

arose in Ohio, and is therefore peculiarly appropriate here. In that case the Court, referring to the statute under which the bank was organized, said (p. 380):

> "The 60th section is not found in a general law, as is intimated by the Supreme Court of the State. The Act of 1845 is *general only in the sense, that all banking associations were permitted to organize under it; but the act is as special to each bank as if no other institution were incorporated by it.* We suppose this cannot be controverted by any one. This view is so clear in itself that no illustration can make it clearer."

In Callender *et al. v.* Painesville & Hudson R. R. C. (1860), 11 O. S., 516-523, the Court held that the general incorporation law enacted under the Constitution of 1851 and now G. C. 8625, is to be "regarded as a statute in *pari materia* with our former special statutes" upon the same subject.

The same doctrine has been affirmed in many other cases and is summed up in 10 Cyc., 222, as follows:

> "3. PROCURING CHARTERS FROM MINISTERIAL OFFICERS—a. NATURE OF CHARTER WHERE CORPORATION ORGANIZED UNDER GENERAL LAW—(1) WHAT CONSTITUTES CHARTER. It cannot properly be said that a corporation has no 'charter' where it is organized by the voluntary action of its members, with the consent and approval of an officer of the state, under an enabling statute permitting corporations of the particular description to be organized. *In such a case the provisions of the articles of association or the articles of incorporation, by whatever name called, constitute the charter of the corporation, in so far as such provisions are authorized by the statute law of the state under which the corporation is formed.* An instrument of incorporation

> which conforms to the provisions of the general enabling statute under which it is made becomes a charter within the protection of that clause of the Constitution of the United States which provides that 'no State shall pass any law impairing the obligation of contracts;' and is hence protected as a contract from subsequent impairment by State action, under the doctrine of the *Dartmouth College case* in like manner as special charters are so protected."

In *Miller* v. *State*, 15 Wall., 478, it was said:

> "Undoubtedly the powers and privileges of the railroad company in this case are the same as they would have been if the company had been incorporated by a special act, and it may also be conceded that the charter, when the articles of association were filed in the office of the Secretary of State, became an executed contract * * *."

With respect to the *scope* of the contract contained in articles filed under Ohio laws, this Court has said:

> "*Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract* which cannot be changed by the Legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, *and other provisions essentially connected with the franchise, and necessary to the business of the bank*, cannot, without its consent, become a subject for legislative action."
>
> *Piqua Branch State Bank* v. *Knoop*, *supra*.

In the light, then, of these uniform authorities, let us examine the charter involved in this case—remembering that the charter has not been repealed by the State but is still in full force and effect as granted.

Corporations are formed in Ohio by making and filing with the Secretary of State articles of incorporation setting forth the name, location, and purpose of the corporation and the amount of its capital stock; and it is specifically required that "IF THE CORPORATION IS FOR A PURPOSE WHICH INCLUDES THE CONSTRUCTION OF AN IMPROVEMENT NOT TO BE LOCATED AT A SINGLE PLACE, THE ARTICLES OF INCORPORATION MUST ALSO SET FORTH (A) THE KIND OF IMPROVEMENT INTENDED TO BE CONSTRUCTED, (B) ITS TERMINI AND THE COUNTIES IN OR THROUGH WHICH IT OR ITS BRANCHES WILL PASS" (*Ohio General Code*, Sections 8625, 8626).

When the State has filed the articles of incorporation, the persons who subscribe them, their associates, successors and assigns, become a body corporate with power to acquire and hold "all property necessary to effect the object for which it is created" and "do all other acts needful to accomplish the purposes of its organization" (*id.*, Section 8627). Under the settled doctrine of the State Courts the corporation then has every right, privilege and franchise it ever can have, and is only limited in one respect, it cannot exercise the power of eminent domain until it has elected its directors. (Kardo *v.* Adams, 231 Fed., 950.)

Section 10,128 provides that any company organized for the purpose of erecting dams across rivers or streams in Ohio to raise and maintain a head of water, &c., to develop hydro-electric power, "*may enter upon any private land*" for the purpose of examining and surveying, &c., and "*may appropriate so much thereof as is deemed necessary*" for its constructions, &c. (see Rec., p. 2). Section 10,132 provides that such companies shall be common carriers (Rec., p. 3).

Pursuant to these statutes the articles of incorporation of the Power Company were duly filed

with the Secretary of State on May 29, 1908, setting forth its name, location, purpose, and capital stock, and specifying also that its improvement, not to be located at a single place, should

> "begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River below the City of Akron, Summit County, Ohio, and extend along said Big Cuyahoga River through the County of Summit to a point where said Big Cuyahoga River crosses the line between Summitt and Portage Counties" (Bill, Par. 3; Record, p. 2).

The amended articles specify that its improvement

> "will have its eastern terminus at or near the Village of Burton Station in Geauga County, its western terminus at or near the confluence of Tinkers Creek and the Cuyahoga River in Cuyahoga County, and its southern terminus at or near Canal Dover, in Tuscarawas County, and with its main line and branches will pass in or through the Counties of Cuyahoga, Summit, Medina, Portage, Stark, Geauga and Tuscarawas in said State" (Bill, Par. 12; Record, p. 6).

The purpose of the organization conforms exactly to the statute (Ohio Gen. Code, Sections 10,128 to 10,134); and the articles *specifically name the Cuyahoga River as the stream in which the dams should be constructed.*

A mere reading of the statutes and articles of incorporation thus makes it plain to a demonstration that the State has granted, not a mere capacity to exist as a corporation nor yet a mere authority to build a plant somewhere upon some river, but *a specific right or franchise to construct a plant upon the Cuyahoga River between specified termini and to appropriate and use the waters of the river in the maintenance and operation of the plant;* or, in other words, a *right of*

way over and along the river for the construction and operation of the plant.

The plain language of the charter, the whole intent and meaning of the grant, is that the Power Company should have the exclusive right to erect dams, locks, raceways, &c., in and upon the Cuyahoga River and the right to enter upon and appropriate the property necessary for the purpose of constructing and maintaining these contrivances in order to develop and sell hydro-electric power. *These* are the "valuable privileges" given by the charter "which conduced to its acceptance and an organization under it." *These* are the rights and powers which are "essentially connected with the franchise and necessary to the business of the corporation." *These* are the things which, in the language of this Court in *Pearsall* v. *Great Northern Railway*, 161 U. S., 646, 664, are "so far necessary to the full enjoyment of the main object of the charter that persons subscribing to the stock might be presumed to take into consideration, and be influenced in their subscriptions by the fact that the corporation was endowed with those privileges during the continuance of the charter."

The charter itself, therefore, is thus so explicit in locating the company's improvement in a specified place and in conferring the right to enter upon and appropriate that place for the construction of the plant, as to make it A SPECIFIC GRANT OF A RIGHT OF WAY *over the river between the named termini—a grant that is in every respect the same as if it were contained in a special act of the Legislature specifically granting to the Cuyahoga River Power Company by name the rights to construct, maintain and operate a hydro-electric plant on the identical portion of the river which is named in the articles.*

A famous case, which has stood the test of time and is directly in point, is *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & Johns., 1. In that case it was held that by the charter of the Canal Company the valley of the Potomac River, from tidewater to the highest practicable point of navigation on the north branch, was *specifically appropriated* to the building of a canal, and at the time of its incorporation the company acquired, not the actual legal title to the land, but a *vested right or franchise to acquire the land by purchase or condemnation*, which could not be defeated without an impairment of the contract. The Court said (p. 144):

> "This franchise, this corporate right, to select and acquire land for the authorized purposes of a corporation, is property; it is an incorporeal hereditament, not a legal title to the land itself, not a mere capacity or faculty to acquire and hold land, such as every individual possesses; but in addition to such capacity, it is a right or privilege, *a portion of the eminent domain vested in the corporation to acquire the legal title to land subjected by the grant to its will*, and thus to convert the incorporeal into a corporeal hereditament, and after the franchise to choose and condemn land for any particular public purpose. That portion of the eminent domain granted and subsisting in one corporation, cannot be bestowed upon another, to the prejudice of the former grant; *nor can any other legally acquire any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise.*"

In *Morris & Essex R. R. Co.* v. *Blair*, 9 N. J. Eq., 635, which involved a controversy between two railroads whose charters fixed merely the

terminal points and prescribed no specific route, the Court referred to this absence of a specific location in the charter itself, and said (p. 644):

> "It is not a case, therefore, of a prior grant of a *specific route for a railroad by* the Legislature to one company, and a subsequent grant of the same route to another company, without repealing the former grant, or providing for compensation. *If it were, upon principle and authority, the first company would take a vested right in the route, to the exclusion of the second. Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & Johns., 1."

It was held that when the grant had been made specific *by the corporation's adoption of a definite route*, that corporation had a vested right to the route, of which it could not be deprived by a subsequent purchase of the land by another company for railroad purposes.

In *Reagan* v. *Farmers Loan and Trust Co.*, 154 U. S., 362, 392, this Court said:

> "In the famous *Dartmouth College Case*, 4 Wheat., 518, it was held that the charter of a corporation is a contract protected by that clause of the National Constitution, which prohibits a State from passing any law impairing the obligation of contracts. The International and Great Northwestern Railroad Company is a corporation created by the State of Texas. The charter which created it is a contract the obligations of which neither party can repudiate without the consent of the other. All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and on the other hand, ONE OBLIGATION ASSUMED BY THE STATE WAS THAT IT WOULD NOT PREVENT THE COMPANY FROM SO CONSTRUCTING AND OPERATING THE ROAD."

In view of this language can there be any doubt that the thing granted by the charter of the Power Company was a right or franchise to construct and maintain a plant upon the river according to its terms, and that one obligation assumed by the State is that it would not do or permit anything to prevent the company from exercising the franchise and making the grant effective?

The decisions which follow and apply the doctrine of the cases just mentioned are too numerous to cite. Many of the more recent cases in this Court relate to grants contained in city ordinances; but there is, of course, no difference in principle. It is the sanction and authority of the sovereign which gives the grant its validity and it is immaterial whether the grant be by the Right of Way Act of March 3, 1875 (18 Stat., 482; 2 U. S. Comp. Stat., 1913, Sections 4921-4926), a Constitution* or in a statute† or in a city ordinance‡. In each case the grant is a complete and binding contract *from the moment the State's offer is accepted*, and "the grantee is thus protected in starting the enterprise" and during "the initial stages", and while "the necessary proceedings preliminary to the execution of the

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*As in Russell v. Sebastian, 233 U. S., 195.

†As in the case at bar, the cases cited in Subd. B, infra, Monongahela Navigation Co. v. United States, 148 U. S., 312; Wilcox v. Consolidated Gas Co., 212 U. S., 19; Piqua Branch State Bank v. Knoop, supra; Reagan v. Farmers L. & T. Co., supra; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650; New Orleans Water Works Co. v. Rivers, 115 U. S., 674; St. Tammany Water Works v. New Orleans Water Works, 120 U. S., 64.

‡As in Louisville v. Cumberland Tel. Co., 224 U. S., 649; Grand Trunk Western Ry. Co. v. South Bend, 227 U. S., 544; Boise Water Co. v. Boise City, 230 U. S., 85; Owensboro v. Cumberland Tel. Co., 230 U. S., 58; Cleveland v. Cleveland City Ry. Co., 194 U. S., 517; N. Y. Elec. Lines Co. v. Empire City Subway Co., 235 U. S., 179.

proposed work are being taken with due promptness."

> *New York Elec. Lines Co.* v. *Empire City Subway Co.*, 235 U. S., 179, 193, 194.

It is settled, too, that acceptance lies in an investment of money and a change of position upon the faith of the offer.

> *Russell* v. *Sebastian*, 233 U. S., 195, 208, 210.

And that, when accepted and acted upon, the grant becomes binding, not step by step as the work proceeds, but "as an entirety, in accordance with its purpose and express language."

> *Russell* v. *Sebastian, supra,* at page 207.
> *Grand Trunk W. Ry. Co.* v. *South Bend*, 227 U. S., 544, 555, 556.

The statutes of Ohio mentioned above (Gen. Code, Sections 8625, 8626, 8627 and 10128-10134), constitute the State's offer. The offer was accepted when the incorporators filed the articles of incorporation and acquired corporate existence (G. C. 8627). When the stockholders subscribed for their stock and elected directors, the Power Comapny had the right to exercise the power of eminent domain (Powers v. Railway Co. 33[illegible] O. S., 429; Kardo *v.* Adams, 231 Fed., 950). The offer was further acted upon when the company perfected its plan of development, adopted its surveys, commenced its condemnation proceedings purchased property controlling the main features of its enterprise, filed injunction suits against this defendant, and otherwise proceeded with the work of completing its corporate purpose. The contract was complete May 29, 1908, and the exemplified copy of the articles issued

by the State are, by the statute, proof of the very rights at issue in this case, and we submit that to say that the company had no vested right to the place designated in the articles as the location of its plant, is to flatly contradict the statement made in *Long Sault Development Co.* v. *Call, supra,* by the same judge who sat in this case below, as well as the repealed adjudications of this Court from the *Dartmouth College case* down to the present time. If the Power Company exists at all, it has rights and obligations.

The State Court has long since receded from the position it took in the "Bank Cases," *supra,* and has for many years recognized that the acceptance of a grant creates a binding contract.

State *ex rel. v.* Cincinnati Gas Light & Coke Co., 18 O. S., 262.

Railway Co. v. *Village of Carthage,* 36 O. S., 631.

City of Columbus v. *Street Railroad Co.,* 45 O. S., 98.

Hamilton G. & C. Traction Co. v. *Hamilton & L. Elec. Transit Co.,* 69 O. S., 402, 69 N. E., 991.

State *ex rel. v.* Toledo Home Tel. Co., 72 O. S., 60, 74 N. E., 162.

Farmer & Getz *v.* Columbiana Co. Tel. Co., 72 O. S., 526, 74 N. E., 1078.

And if it had not it would not be controlling here.

In *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S., 517, this Court said (p. 534):

> "That in the Courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. *Railway Co.* v. *Village of Carthage,* 36 Ohio St., 631, 634;

City of Columbus v. *Street Railroad Co.*, 45 Ohio St., 98."

In the *Hamilton case, supra,* the Supreme Court of Ohio, upon full consideration squarely held that a grant of the right to occupy and use certain streets for the purpose of constructing, operating and maintaining a street railway, was a *contract* and *a vested property right* which could not be taken or impaired except upon payment of just compensation, even though the grantee acquired no fee in the soil upon which its railroad was to be constructed. In the course of the opinion it was said:

> "But it is, we think, equally well settled that where the right is given by ordinance to a street railway company to occupy and use particular parts of certain streets, and the grant so made is accepted and acted upon by the grantee, the City authorities are thereafter, so long as said grant remains in full force, unforfeited and unrevoked, without right or authority to grant to another street railway company for like use the right to have and occupy without appropriation, or the making of compensation therefor, to the first grantee, *precisely the same ground or right of way first granted.* To permit this would be to sanction and allow the impairment of the obligation of an existing contract by subsequent municipal legislation or grant. This may not rightfully be done.
> * * * * * *
>
> "While it is undoubtedly true that a street railway company, under a grant authorizing it to occupy and use certain streets for the purpose of constructing, operating, and maintaining thereon its street railway, *acquires no fee in the soil upon which its roadbed is constructed* and its ties and tracks are laid, *it nevertheless does acquire therein a franchise and easement, which becomes and is its prviate property;* and it has the

> right, during the life of the grant, to the possession and enjoyment of that franchise and easement without interruption or obstruction from any other company, until such time, at least, as it may voluntarily surrender the same, or be legally divested thereof by an authorized appropriation and the payment of full compensation therefor, as required by the Constitution and Laws of the State of Ohio. The right which the grantee acquires by such grant *is more than a mere license. It is a vested property right,* in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and *such grant carries with it the right of exclusive occupancy and user of that portion of the street* for the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public; and where, as in this case, there are conflicting claims asserted by rival companies, each claiming the same location under grant from the City authorities, and for the same character of use, such claims, even were both grants authorized, should be settled and determined by applying the rule that the first of said grantees to rightfully occupy the street has the superior and better claim of right thereon."

In *State* v. *Toledo Home Telephone Co.*, 72 Ohio St., 60, the Supreme Court said:

> "• • • Taking these sections with others in the same chapter, it seems clear that telephone companies have their grant directly from the state through its General Assembly to occupy the roads, streets, and highways with their lines and fixtures, and that a grant for that purpose from the municipality is not necessary. These statutes were so construed in Zanesville *v.* Telegraph & Telephone Co., 64 Ohio St., 67; 59 N. E., 781; 52 L. R. A., 150; 83 Am. St. Rep., 725."

In *Farmer & Getz* v. *Columbiana County Telephone Company*, 72 O. S., 526, the Court said:

> "' * * *A telephone company gets its right to go upon the streets, with its poles, wires, etc., from the state* (Sections 3454 to 3471-8, inclusive), *and the power of the municipal authorities in the premises is to agree upon, not the right to use, but the mode of use.*"

In *Louisville Trust Co.* v. *Cincinnati*, 76 Fed., 296, Mr. Justice LURTON (then Circuit Judge), speaking for the Circuit Court of Appeals for the Sixth Circuit in a case involving the construction and effect of a grant under the law of Ohio, said (p. 299):

> "The grant of a right to enter upon and ocupy a public street with the necessary tracks, poles, wires and quipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right capable, in the absence of express restrictions, of being sold, conveyed, assigned or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or contract rights."

No distinction can be drawn between a grant of the right to enter upon and occupy a public street with a street railway or other public utility and a grant of the right to enter upon and occupy a stream with a hydro-electric plant; and the cases cited are controlling. They are clear, explicit, and decisive, in holding that the Ohio statute here involved is *an offer by the State*, which was accepted by the Power Company's organization under it and was converted, by such acceptance, into a binding *contract* and *a vested property right*. Indeed, the decision of the State Court in the *Hamilton case, supra*, leaves but little to be said here. The Power Company's direct grant from the State of

the right to construct and maintain a hydro-electric plant upon the Cuyahoga River is fully as binding and efficacious as the grant which the Hamilton Transit Company received from or through the City of Hamilton. The place where the Power Company's plant was to be located, viz.: along the Cuyahoga River between the termini mentioned, before it was further definitely fixed and "anchored" by condemnation suits and land purchases within the express terms of its grant, is as definite and precise as the grant of a right to lay tracks in a specified city street as treated by ordinance or license. The grant was accepted and acted upon when the Power Company completed its organization and "by its investment irrevocably committed itself to the undertaking," and it acquired "a vested property right in although it had acquired no fee in the soil upon which its plant was to be constructed. The analogy between the *Hamilton case* and the case here is complete.

Every railroad company organized in Ohio since 1852 has been organized under a general statute the same in substance as that under which the Power Company was incorporated, and the entire power and franchise obtained by every such railroad company is that derived from the provision of the statute that

> "Any railroad company may maintain and operate, or construct, maintain and operate, a railroad, with a single or double track, with such side tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place, named as a terminus of its road" (R. S., Sec. 3270).

Ohio General Code, Section 8745.

It is this statute which constitutes the grant of special power under which most of the existing railroads were built and are being operated. The same thing is true, in a general way, of most of the railroads in other States.

The ruling of the Court below that no rights were acquired by the Power Company, although it was duly incorporated under a valid statute for the sole purpose of constructing and operating a public improvement in a specified place, proceeds upon what this Court has recently called "an evident misapprehension of what constitutes incorporation," for it fails to take into consideration the fact that

> "a corporation is *never merely created.* Being artificial, possessing no faculties or powers save such as are conferred by law, and having in legal contemplation no existence apart from them, its *incorporation consists in giving it individuality and endowing it with the faculties and powers which it is to possess.*"
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> *Bankers Trust Co.* v. *Tex. & Pac. Ry.*, 241 U. S., 295, 307, 308, per Mr. Justice VAN DEVANTER.

The State Court has said:

> "In filing articles of incorporation the Secretary of State acts for and on behalf of the State, not on behalf of the individuals who desire to become incorporated. The official service he performs as the agent of the State is to create a corporation. This is the immediate result of the filing of the articles. The official services rendered by the Secretary of State under this act is but another description for the granting of franchises by the State." (Ashley *v.* Ryan, 49 O. S., 521.)

And if the ruling that the incorporation of a company for the purpose of constructing and maintaining a public improvement in a specified place gives the company no rights whatever, legal or equtable, be sustained by this Court, then the whole law of corporations is upset and the consequences are grave indeed, not only for this plaintiff, but also for every other person and corporation expending money for the erection of any public utility whatever and for the large portion of the citizens of the country who are dependent for light, heat, power, water, telephones, telegraphs and railroads upon the activities of these private companies undertaking the public service. For if the Power Company's charter does not mean that the right to construct the plant *in the place designated in the articles* is granted to it, what does it mean? When is such a franchise acquired? Is it when the soil is actually acquired and paid for? Is it when the proposed improvement is actually constructed? Is it when the contemplated service is actually commenced? If this be so, then no right to build the plant can ever be acquired—the State's offer of the right to build dams in a particular river cannot be accepted at all, and the only thing which can be acquired is the right to maintain a plant already constructed. There is no middle ground upon which to stand. One doctrine or the other must be applied; and if the plaintiff's claim here be not sustained, then no right to acquire the lands necessary to make the State's grant useful or effective could vest in the company during all the long years necessary for the acquisition of title and the construction of the physical works, and investors in such enterprises must take their chances as to what may happen during the interim. It is needless to say

that if that be the law, it simply means that public utilities cannot be built, for it is an actual fact, repeatedly recognized by this Court, that private capital will never be invested in such undertakings if the rights of the corporation undertaking the service be subject to immediate revocation, either by legislative repeal or by the interference of other corporations seeking to utilize the same subject matter for a conflicting use, at any time before the company gets to the point of actually furnishing the service which it was formed to supply.

N. Y. Elec. Lines Co. v. *Empire City Subway Co.*, 235 U. S., 179, at p. 193.
Louisville v. *Cumberland Telephone Co.*, 224 U. S., 649, at p. 663.
Boise Water Co. v. *Boise City*, 230 U. S., 85, 90.
Owensboro v. *Cumberland Telephone Co.*, 230 U. S., 58.
Russell v. *Sebastian*, 233 U. S., 195, 208.

From some of the arguments used in opposition to this statement of the law, it seems that the thought—or rather the feeling—that really controls those who oppose our views is a sort of surprise that a valuable franchise can be obtained by the simple act of filing articles of incorporation and subscribing to the stock of a company. But the fact that that proposition should cause any surprise simply shows that our long enjoyment of the equality of opportunity and freedom from legislative favoritism which is secured by general incorporation laws has tended to cause us to forget the evils which prevailed in the days when charters were obtained by lobbying in the Legislatures. Experience produced the conviction that special legislative grants sometimes had been unwise, sometimes had been the result of favoritism

towards certain interests, and had had the effect of fostering monopolies by precluding free and open opportunity to all; and the very object of general incorporation laws was to remove these evils by giving to all citizens alike an equal opportunity to earn that profit which is reasonably derived from an investment of private capital in undertakings for the public service,* or possibly ta relieve the State of the losses which may occur in such enterprises.

Even if the general incorporation laws of Ohio were too liberal—even if the grant in the case at bar were improvident—it was not within the province of the Court below to undertake to neutralize the mistakes of the Legislature by holding that the grant did not exist. The argument of improvidence was made in the case of *The Binghamton Bridge*, 3 Wall., 51, and the Court replied to it as follows:

> "If the knowledge that a contract made by a State with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and care on the part of law-makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the Court, but it is to be found elsewhere."

But in these days of Public Service Commissions, with their extensive powers of regulation of charges and service, there is little likelihood that the rights of the public will not be adequately protected. Moreover, the power exercised by the Court below is a repeal of the charter of the Power Company in fact, if not in express terms,

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*For comment upon the situation in California see **Russell** v. **Sebastian**, 233 U. S., 195; for the situation in New York see **Rochester C. T. R. Co.** v. **Joel**, 41 N. Y. App. Div., 43, 48; and for the situation in Ohio see **Callender** v. **Painesville**, p. 39, infra, **Railroad** v. **Bolen**, 76 O. S., 376.

and that power is vested by the Ohio Constitution, Art. XIII, Sec. 2, in the State Legislature, and not in the District Courts of the United States.

The Ohio Legislature that passed the Act of 1904 (now Sections 10,128-10,134 of the General Code) was just as wise and just as much interested in benefitting the public as the City Council that passed the appellee's ordinance. It had a great question before it—the question of conserving and developing the natural resources of the State. It certainly had a purpose in enacting the statute, and that purpose, as appears from the statute itself, was none other than "to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared," and thereby "supply what, next to intellect, is the very foundation of all our achievements and all our welfare." (*Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S., 30, 32, per Mr. Justice HOLMES.) The Legislature undertook to do this by means of private companies to be organized for the purpose, and "it would be *virtually impossible to fulfill the manifest intent of the Legislature* and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the (grant) should be subject to revocation at any time by the authorities,—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, *but because as yet no contract whatever had been made* and there was nothing but a license which might be with-

drawn at pleasure." (*N. Y. Electric Lines* v. *Empire City Subway*, 235 U. S., 179, 193).

By enacting the statute in question the State of Ohio *invited* the investment of private capital in the work of conserving natural resources by developing the then wasted power of the streams of the State; and law and morals, reason and authority, unite in demanding a holding that the offer having been accepted there resulted a contract which cannot be impaired. The grant is not a *nude pact* but rests upon an obligation expressly or impliedly assumed to carry on the undertaking to which it relates; it was made and received upon the understanding that the Power Company was *protected by a contractual right from the moment the grant was accepted* and during the course of performance as contemplated as well as after that performance (*New York Electric Lines* v. *Empire City Subway, supra*, p. 193). And, as already stated, the manifest intent of the legislation to secure a development and utilization of the wasting power of the streams of the State cannot be fulfilled unless that protction is enforced by the courts.

B. BEFORE APPELLEE COMMENCED THE CONFISCATION OF THE PROPERTY OF APPELLANT, THE POWER COMPANY HAD A VESTED AND INDESTRUCTIBLE RIGHT IN ITS LOCATED RIGHTS OF WAY AS GRANTED TO IT BY THE STATE OF OHIO AND THE GRANT WAS DEFINITELY FIXED BY THE CHARTERS DULY ISSUED BY THE STATE NAMING "THE TERMINI AND THE COUNTIES IN AND THROUGH WHICH IT, OR ITS BRANCHES WILL PASS"; ALSO, BY DULY ADOPTED SURVEYS OF DEFINITE LOCATIONS, ALSO BY CONDEMNATION SUITS DULY FILED IN SUMMIT AND PORTAGE COUNTIES, ALSO, BY THE PURCHASE OF PRIVATE TITLES UNDER INSTRUMENTS DULY RECORDED IN SUMMIT, PORTAGE AND GEAUGA COUNTIES.

Even if the Articles of Incorporation did not definitely fix the location and franchise of the Power Company, that result certainly flows from its adoption of its plans, surveys and descriptions (whereby it definitely located its proposed improvement upon specifically described parcels of land) and its resolutions of appropriation. For it is established by innumerable authorities (including many decisions of this Court in construing grants of public lands for railroad irrigation and other public purposes), that when a railroad or other eminent domain corporation has "definitely fixed" the place where it will build, it has a prior and exclusive right to that place and is entitled to go ahead and acquire the ownership of it and construct and maintain its works thereon, free from the interference of third parties. The right is recognized as a grant from the State and as a typical *franchise*, and it is uniformly protected as a vested property right derived from the sovereign. It exists although no map of the location has been filed in any public office and although condemnation proceedings against the owner have not been completed or even started. As said by this Court, "The company is entitled to protection as soon as its final location is complete." (See Ohio cases, p. 20, *supra;* a, p. 37, *infra.*)

Denver & Rio Grande R. R. Co. v. *Arizona & Colorado R. Co.*, 233 U. S., 601.

Sioux City, etc., Co. v. *Chicago, etc., Co.*, 27 Fed., 770.

Wheeling B. T. Ry. Co. v. *Camden Cons. Oil Co.*, 35 W. Va., 205 (cited in this Court, 233 U. S., 603).

Chesapeake & Ohio Ry Co. v. *Deepwater Ry. Co.*, 57 W. Va., 641, 666; 50 S. E., 890.

Williamsport & North Branch R. Co. v.

Philadelphia & Erie R. Co., 141 Pa. St., 407; 12 L. R. A., 220.

Noble v. *Union River Logging R. R.*, 147 U. S., 165-176.

Rochester H. & L. R. R. Co. v. *N. Y., L. E. & W. R. R. Co.*, 44 Hun, 206; 110 N. Y., 128.

Suburban Rapid Transit Co. v. *Mayor, etc.*, 128 N. Y., 510.

Lewis on Eminent Domain, Sections 503, 504.

Elliot on Railroads, Sections 921, 927.

33 *Cyc.*, 111, 127, 137, 138, 139.*

In *Barre R. R. Co.* v. *Railroad Companies*, 61 Vt., 1; 12 Atl., 923; 15 Am. St. Rep., 877; 4 L. R. A., 785, the controversy was between two companies designated by the Court as Barre Company and Granite Company. The Granite Company was organized on April 9, and it adopted a survey of its proposed road and caused the same to be filed on the same day. At that time the owner of the land in dispute had contracted to convey the land to the Barre Company and on April 10th he gave the Barre Company a deed for the land. It was contended that even if the Barre Company's purchase be regarded as subsequent to the adoption of the location, it yet gave that company the better right to the land, because in any event the purchase was made, "*before the Granite Company had paid or deposited the land damages and so became entitled under the statute to the seizing and possession of the land.*" The Court held, however, that

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*These authorities were quoted at length in the appellant's brief in **Cuyahoga River Power Co.** v. **Akron**, 240 U. S., 462, and it therefore seems unnecessary to do more than refer to them here. They are but a few of the many cases in many States which announce the same doctrine.

the Granite Company had the better right. It quoted from the case of *Rochester, H., L. & R. Co.* v. *New York, L. E. & W. R. Co.*, 110 N. Y., 128, cited above, as upholding the right of the company making the first location, and then said:

> "The decisions in New Jersey and Pennsylvania and other states have been the same. *Indeed I have not found, and do not think there is a judicial decision or utterance to the contrary.*"

The Court further held that the fact that the owner of the land had previously made an unrecorded contract to convey to the Barre Company did not affect the case.

In *Fayetteville St. Ry. Co.* v. *Aberdeen R. R. Co.*, 142 N. C., 423; 55 S. E., 345; 9 Ann. Cas., 683, the company which first adopted a location *by resolution of its board of directors* was held to have a prior right to the route in controversy as against a rival company which *actually purchased* the land from the owners after the adoption of the resolution of location but *before the institution of a condemnation proceeding.* The Court said:

> "On this question the authorities are to the effect that where the grants are indefinite, leaving the exact route to be selected by the company, the prior right will attach to that company which *first locates the line;* and, in the absence of statutory regulations to the contrary, the first location belongs to that company which first defines and marks its route and *adopts the same for its permanent location by authoritative corporate action.* Lewis on Eminent Domain, vol. 2, sec. 366; *Railway* v. *Railway*, 141 Pa. St., 407; *Railway* v. *Railway*, 159 Pa. St., 331; *Johnston, Childs et als., exrs.*, v. *Callery*, 184 Pa. St., 146; *Railway* v. *Blair et al.*, 9 N. J.

Eq., 635; *Railway* v. *Railway*, 110 Fed., Rep., 879."

And also:

> "In some of the authorities supporting this position it is stated as one of the requirements that the route, or line, after being surveyed, shall be platted and returned to the general offices of the company, and there approved as stated; and in others, that such survey and plats shall be filed in some public office and there recorded. But this will, no doubt, be found, on examination, to be on account of some public statute or provision of the charter, and is *not an incident of a completed location*, as a general proposition. *There is no such statute with us.*"

These cases, of course, merely reiterate the rules stated in the other cases cited at the beginning of this point, but we have quoted from them in order to bring sharply to the mind of the Court that, from all the cases it is apparent that *neither the absence of a statute requiring the filing of a map in a certain place nor the existence of a provision that the title of the private owner cannot be acquired in advance of actual payment of his compensation, affords any reason for holding that the doctrine that priority of location gives priority of right as against third persons does not prevail in Ohio.*

(1). THE STATUTES AND DECISIONS OF OHIO FULLY SUSTAIN THE DOCTRINE THAT A VALID GRANT AND A LOCATION THEREUNDER IS A RIGHT OF CONTRACT AND PROPERTY.

The Court below erred in assuming that Ohio does not require the filing of surveys and maps. On the contrary, the statutes of Ohio are as rigid as those of other states in this respect. No negotiation or condemnation can be made in Ohio

without a survey and a map or its full equivalent (see p. 48 [c], *infra*), and the private owner therefore has all the protection he has in any other state.

Of course an exercise of the power of eminent domain does not deprive the private owner of any rights except such as he voluntarily assumes by being a member of organized society. This proposition is not open to argument. It is universally recognized as one of the necessary attributes of government and the power exists in all governments even though not expressly referred to in the Constitution.

Many of the cases relate to the location of *railroad* routes and involve to some extent the construction of local statutes. They nevertheless rest upon a broad general principle, which is not only logical, just, and right, but of absolute practical necessity if public utilities are to be constructed, and which is applicable to all corporations exercising the power of eminent domain for the purpose of acquiring property for public use. Whatever difference there may be between the location of a railroad route and the Power Company's location of the lands which it will use for its improvement, is a difference which but calls more loudly for the application of the rule of the railroad cases to the case at bar, for the reason that the basis of the doctrine that the definite location of a railroad route establishes a property right which must be respected by other corporations, including municipalities, apply with much greater force to the situation of the Power Company. A railroad, if part of a projected route be taken from it, is usually still able, by the construction of somewhat different lines, to carry on its business of railroad operation between the desired points. Its corporate purposes

may still be fulfilled. But a hydro-electric corporation *must* use the waters of the river described in its articles of incorporation or cease business. It cannot adopt an alternative route. Moreover, as we shall hereafter point out, the statutes of Ohio are so similar to the statutes involved in the cases cited above as to admit of no different result.

In the face of these considerations and controlling authorities, the Court below has ruled that the Power Company did not acquire any right or interest whatever, legal or equitable, in or against the lands and waters here involved (Rec., p. 49). The whole doctrine of charter grants priority of location, and the rights of security holders and the public, in the grant or location, which has, indeed, become a rule of property upon which all eminent domain corporations have relied for years, is denied and repudiated and declared never to have existed in Ohio. So also is the laws of *lis pendens* and the effect of the purchase of private lands. The Court stated its view as follows (Rec., p. 49):

> "In Ohio the declaration upon the private records of a corporation of an intention to construct an improvement upon or over any lands without further action taken, or payment made does not give to the plaintiff any title or right whatever legal or equitable in the lands embraced within such paper scheme. This is distinctly the settled law of Ohio, and the best expression of it is, I think, to be found in the case of *Columbus, etc., Co.* v. *T. & O. C. Ry. Co.*, 32 W. L. B., 186. This is a Common Pleas Court decision, but it is well worked out and the absence of decision by higher courts on a question which must have frequently arisen is of itself confirmatory of its authority as an expression of the accepted law of the State. The Court says:

> "'But the grant, by articles of incorporation to a railroad company of a right to construct a road is afloat; it attaches to no specific lands until the line of the road is sufficiently fixed by purchase of the land, or by condemnation proceedings and acceptance of the land condemned. Even after the land is condemned, the Railroad Company may elect not to pay the price and accept the land. The fact that a Railroad Company has surveyed and staked a line upon certain grounds does not conclude it, why then should it conclude anybody else? The company may survey and stake more than one line and by comparing the cost and advantages of each of them, determine upon which it will build, but the line is not definitely established until the land is condemned, paid for or accepted, or purchased by agreement'."

The case cited and the quotation therefrom do not state the law of Ohio for the following reasons:

a. *The grant to an Ohio corporation is valid and binding when the certificate is filed and is granted as an entirety in accordance with its purpose and express language.*

The Court below held on the authority of Belt Line case, quoted above, that a grant by articles of incorporation is what is generally known as a "float" grant, and confers no rights, either legal or equitable, because it might be changed.

Thus the Court construes the usual customary authority, *to change a location for given reasons,* to deprive the grant of any validity whatever.

The principle asserted is contrary to the general rule, and also contrary to the charters, statutes and decisions of Ohio.

Mr. Lewis states the rule as follows:

> "In nearly all statutes conferring the power

> of eminent domain, some discretion is left with those who are vested with the power, in respect to the designation of the property to be taken. Formerly, when public works were constructed mostly under special laws and charters, it was common to specify with more or less particularity the *termini* and route of any proposed railroad, canal or other public way. In the present day it is more common to provide by general laws for all works of this character under which both the route and *termini* are left to the determination of those who choose to avail themselves of the statute. In such cases the articles of incorporation take the place, somewhat, of the former special charters, and, in so far as they designate the location, route or *termini* of the proposed work, would probably receive a similar construction. In either case there remains a discretion to be exercised in the actual location of the road according to the general route and *termini* specified in the charter or articles of incorporation. *When the choice or discretion which is thus given has been exercised, the power is exhausted, and the location cannot be changed, in the absence of a statutory provision permitting such changes to be made.* (Lewis Em. Dom., Vol. II, Sec. 402.)

This has also been the rule of the State of Ohio since the grant of its first charter under the former constitution, to the Knox, Richland & Huron Turnpike Company in 1817. In the early cases before the Constitution of 1851, the rule of the State Court was as follows:

> "Where the statute gave the right to railroad corporations to make a change of location, whenever a better and cheaper route could be had, or whenever any obstacle occurred, either by way of difficulty of construction or *inability to procure right of way at a reasonable cost*, it was held that the privilege must be exercised befort completion."

Moorehead *v.* Little Miami R. R. Co., 17 Ohio, 340.

Little Miami R. R. Co. *v.* Naylor, 2 Ohio St., 235; 59 Am. Dec., 667.

Atkinson *v.* Marietta & Cincinnati R. R. Co., 15 Ohio St., 21.

Obviously the provision that the route might be changed to secure "a right of way at reasonable cost" is inconsistent with the contention of defendants that a corporation must first buy a right of way in order to secure a location.

In short, this decision alone disposes of appellee's entire case. Ohio corporations do not *buy*, to *locate*. They *locate*, and *relocate*, if authorized by statute, to *buy at a reasonable cost*.

Since the adoption of the present constitution the question of the right to make a change of location has freqeuntly arisen in the State courts, and in no case has it ever been decided that because the right to make the change existed, the grant itself did not confer rights, both legal and equitable. The whole question of what constitutes a legal location under the Ohio statutes, was fully discussed in Callender *v.* Painesville, etc., R. R. Co., 11 O. S., 424 (decided in 1860), and the doctrine of that case has never been overruled.

The Court said:

"Acts of the Legislature incorporating private companies for the purpose of constructing turnpikes, canals and railroads, are found in our statutes, from the earliest history of legislation, in this State, down to the time of this act. Our new constitution, however, prohibited their passage, in the manner formerly enacted, by *special* acts; and provided that corporations should thereafter only be formed under *general* laws. Hence this general act upon that subject. *This act is nevertheless subject to be interpreted, and construed ac-*

cording to the general rule of interpreting all statutes. This statute must be regarded in connection with our former system of legislation upon the subject, creating like corporations; and although this is a general statute, yet as it is a statute investing private associations with corporate powers and capacity, to construct a public thoroughfare, it is to be regarded as a statute in *pari materia,* with our former special statutes upon the same subject.

"In order, then, to determine what the Legislature really meant by the words, 'the name of the place of the termini,' as used in this act, let us recur to the degree of precision used by the Legislature in former statutes upon the same subject as to the 'termini,' of roads and canals, to be constructed by corporate companies.

"The act incorporating the Knox, Richland and Huron Turnpike Company, passed January, 1817, incorporated the company, in the language of the act, 'for the intent and for the purpose of making a turnpike road from Newark, through Mount Vernon, Mansfield & Truxville, *to such point* on Lake Erie, or Sandusky Bay, as the directors may think most to the interest of the State.'

"The act to incorporate the Franklin Canal Company, passed in 1836, provided that the canal should 'commence in or near the Town of Franklin Square, in Columbiana County; from thence to pass down the middle fork of the Little Beaver until it shall intersect the Sandy and Beaver Canal, *at some suitable point* northwest of New Lisbon in said county.'

"The Act of 1937 incorporating the Bellefontaine and Perrysburgh Railroad Company, authorizes the company to construct a railroad from the town of Bellefontaine, 'or from any point on the Mad River and Lake Erie Railroad, north of Bellefontaine, and the two companies may agree,' and thence to Perrysburgh.

"The terminus of the Ohio and Indiana Railroad Company, by its act of incorporation passed in 1850, is thus expressed, 'thence to upper Sandusky, in the County of Wyandotte, and thence on such route as the directors of the company, or a majority of them, may select, to the west line of the State of Ohio; and thence to Fort Wayne in the State of Indiana,' the west line of this State being thus made, at any point, to constitute a terminus.

"*Indeed it will be found, I apprehend, that the rule has been in our past legislation, to have the point of the termini somewhat indefinite in the charter, and that it has only become determinate by an actual location.* Nor can I perceive that the language of the statute under consideration intended to change the rule in that regard. It was found convenient, and often necessary, under our special legislation, both for the limitation of the powers to be granted in the charter, *and for the purpose of avoiding conflict in prior and subsequent grants of corporate powers for like purposes,* to have reasonable certainty expressed in the charter. For like reasons, and to secure the same objects, the certificate is required to express with like certainty, as was before expressed in the charter, as well as the place of the termini and the counties through which a license to construct is asked, as the name of the company. *And the certificate when thus made, acknowledged and certified, and recorded by the Secretary of the State, by force of the statute, becomes to the company, and to third persons, as authoritative a description and license to locate the road in a reasonable compliance with such description, as would the same language expressed in a special act or charter, under our former constitution.*

"To require a greater degree of certainty, in the certificate or charter, to give it validity, would necessarily defeat its object in many, if not the most of cases contemplated by the statute. *For it is only by force of the license*

derived from the certificate, under the statute, that the company could send its engineers upon the lands of others, along the route, to make the necessary estimates to determine upon the feasibility of any route upon which to make a location, and determine the necessary points of the termini of the road, with entire precision. But the object being of public interest and construction of such roads by private enterprise equally subservient to the convenience of the public, as if constructed by the State at public expense, such enterprises undertaken by private associations, have always been favored by the State, and the object of the Legislature has been, as evidenced by past legislation, to invest such companies with all that right of eminent domain, which the State herself might reasonably exercise in the location, construction, and maintenance of such public improvement.

"The termini and line of this road would, without doubt, have been regarded sufficiently certain if expressed in the same language used in this certificate, in a special act or charter under our former constitution; and I am unable to perceive, either in reason or law, any ground for an exception to its validity for want of certainty, under this general act, which could not have been urged against the incorporation of the company if so claimed under a special act or charter."

Callender *et al v.* Painesville & Hudson R. R. Co., 11 O. S., ~~121~~ 516 (1860).

The certificate of the Power Company, therefore, when acknowledged, certified and recorded, became to the appellee *an authoritative description of the place where the Power Company was licensed to locate its plant.*

Neither has this rule, of necessity, in public utility construction been changed in any later decision by the Supreme Court of the State.

In Ashtabula R. R. Co. *v.* Smith, 15 O. S., 328, 335, the Court held in construing a stock subscription:

> "On the third of April next following their election, *the board located the road on the route* * * * but it is claimed that the *location of the road* was not in compliance with the terms of the condition—that the road should have been *completed* * * * *The language in question is used to designate the line of route upon which the road was to be constructed, and this particular route was selected by the directors.*"

Taken in connection with the exact and full statements of the Court in the earlier cases, and especially in Callender *v.* Painesville R. R. Co., *supra,* there can be no question that the Court meant by the "designation of the line of route upon which the road was to be constructed and its selection by the directors," nothing more than the adoption of what the Court below anathematizes as a mere declaration upon the private records of the corporation, and as an entirely private corporate action of the Power Company and a grandiose scheme." Yet this is the scheme of the State itself (Ashley *v.* Ryan, 49 O. S., 520-21), and the stockholders who have underwritten it at the solicitation of the State have the right in law and morals that it shall not be confiscated by the City of Akron.

In 1870, in Warner *v.* Callender, *et al.,* 20 O. S., p.190, was an action to collect a stock subscription, which was in these words:

> "The undersigned agree to take the amount of stock set opposite their names: Provided the road is *built* inside of 150 rods north of the center of the Hamilton Township * * * and the Court held, '*When a subscription book speaks of locating a road, everybody*

*understands it to mean less than a finished road. * * * A mere line surveyed and established as the locus to be built upon in one place in preference to other places,* and the parties cannot fairly be held to have intended differently. In every case it must, from the very nature of the case, be supposed *and held that it was the location* of the road, and not its structure, that was intended to be specified.'"

And again, in 1875, the State Court held, in enforcing a subscription to capital stock in Mansfield, Coldwater and Lake Michigan Railroad Company *v.* Stout, 26 O. S., 253, in construing the condition "that said Railway Company *shall pass through* Henry County and the Town of Napoleon, and establish its depot within 80 rods of the town plat of said town," that the condition was performed by the railway company locating its road through the places named, which location consisted not in a purchase of private titles, but in letting a contract for work. The question did not turn upon the adoption of a resolution fixing the location, because no such resolution had been adopted, but the contract for work was held by the Court to be a substitute. No question was raised concerning the purchase of lands one way or the other, and the contract of subscription was valid and binding without reference to that fact.

And again, as touching another phase of the question involved in this case, the ruling by Judge Luther Day, in Powers *v.* Railway Co., 36 O. S., p. 429, which was a condemnation case, is conclusive that the doctrine of Ohio is not as stated by the Court below, even conceding that that court, and not this Court was the final arbiter of the questions involved.

The railroad company in this case (see Opinion,

p. 432) had only fixed the location of the road by accepting its charter. It then proceeded to adopt the usual resolutions to condemn particular parcels of property within the grant. *The land owner conceiving that he had, as one of the public interested in the road, a right both legal and equitable to know exactly where the line was to be located, moved to dismiss because the company did not prove the adoption of the line as a whole, by "record or paper evidence."*

The plaintiff had necessarily, as required by G. C., 11046, put in evidence its charter describing its location.

At page 429 the Court said:

> "Where, in such proceeding, the company has filed in the proper court a written statement, specifically describing the property sought to be appropriated, *no further written or record evidence of the line of the road is essential* to the right of the company to have an assessment by jury to be paid for the property so described."

Syllabus 4, approved by the Court.

And again the Supreme Court of Ohio decided the precise question involved here in Hamilton G. & C. Traction Co. *v.* Hamilton L. & Electric Transit Co., January 19, 1904. This was 10 years after the decision of Judge Pugh, but more than ten years prior to the decision by the Court below, and this decision plainly declares what was then, and always had been, the established law of the State upon the questions involved in this case.

> See Hamilton, etc., *v.* Hamilton, etc., p. 19, *supra.*

This decision is by the Supreme Court of the State, and is "uncommonly well worked out," and being by the highest court with full notice of the

contrary decision by Judge Pugh, it must be held to be "best expression of the settled law of the State." The failure of the Court to cite or even notice the Pugh decision may be taken as an indication that the latter was obviously unsound. That this is true is proven by the citation in the Hamilton case of State *v.* Coke Co. (1868), 18 O. S., 262, which established that a grant is to be strictly construed and cannot be made to cover streets of a city upon which no location has been made.

b. A location specifically granted or duly adopted cannot be changed by the corporation without a further grant of power by the State.

In 1872 the Legislature settled the principle that the location in a charter is "valid and binding" and the location described in a line changed according to the terms of the statute is also "valid and binding" *when the certificate is filed*, by enacting the following law:

> "Sec. 8747. *By a resolution adopted by a majority of its board of directors*, at a meeting thereof duly called for the purpose, with the written consent of three-fourths in interest of its stockholders, *a company may change the line, or any part thereof, and either of the proposed termini, of its road.* No change shall be made which will involve the abandonment of any part of the road, either partly or completely constructed. Any subscription of stock made upon the faith of the location of the road, or a part thereof, upon a line abandoned by the change, shall be cancelled at the written request of a subscriber who has not consented thereto, filed with the secretary or other chief officer of the company, within six months after such change (R. S., Sec. 3272).
>
> "Sec. 8748. When such change is made it shall be described in such resolution, a duly

authenticated copy of which, under the seal of the company, shall be filed with the Secretary of State, and by him recorded, with proper reference, on the record of the articles of incorporation of the company. *When so filed, such change shall be considered as made, and be valid and binding* as if the changed line had been the line originally described in the articles (R. S., Sec. 3273).

"Sec. 8749. When such company has issued its mortgage bonds for the construction of its road, the record of the mortgage securing them, in each county through or into which the changed line of the road passes, shall be as effectual to create a lien upon the changed line of road, and upon the property of the company, as if the mortgage contained a complete description of the changed line, and of such property" (R. S., Sec. 3274).

These statutes show by their very words that the route in the original articles of incorporation is valid and binding by virtue of the filing of the articles, and not by the purchase of private titles.

The Power Company has not undertaken to change its location; it demands the right to hold, own and possess the location named in its charter, free from the interference of appellee or any other corporation. Under its enabling act, it has no authority to change its location. And although the above statute expressly provides that a railroad corporation may, under proper proceedings, *change* the charter grant, the Court will notice that this *change*, also is "valid and binding" by *virtue of a certificate* filed with the Secretary of State and "*the change is then made.*"

In asserting that the Belt Line case is the only case in Ohio on the subject, defendants refuse to recognize that "an accepted grant of a State is a contract executed," and therefore, *any interference* with that grant raises the ques-

tion of a taking. Such interference may come about not only through the action of other corporations, giving rise to the so-called priority of location cases, but also in proceedings to change the location of the grant, as above provided for, in stock subscription cases, in condemnation proceedings, in rate and taxation cases, and, of course, others which we need not now enumerate. As shown above, the Ohio books are full of cases involving this question which the Court below said had never been considered before, except by Judge Pugh.

The "accepted law of the State" thus is and has been since 1817 that a definite grant in a charter or the adoption of a location *does* conclude the corporation, and even when it obtains a grant of power from the State to make a change it is still liable for the damages caused by the change, and subscriptions made upon the faith of the original location are cancelled.

(c) *Location must precede condemnation or purchase of the lands, both as a matter of law and as a matter of practical necessity, and appellant has filed surveys, maps, plans and profiles in various State and Federal Courts and with this Court in Cuyahoga River Power Co.* v. *Northern Realty,* 244 U. S., 300.

No directors of any corporation can or do go out and purchase lands, hit or miss, without previously adopting a plan and resolving upon the *location* of the improvement to be constructed, and the statutes prohibit such proceeding. G. C., Sec. 10128 provides for a survey and appropriation of the lands described therein. Section 11039 requires negotiation as per this survey, and if unable to agree the corporation may file a petition which must contain a specific description of the

lands and a determination of necessity based upon the requirements of an adopted plan. Therefore, before a man can be divested of his lands he has had notice of a survey, usually accompanied by a map and the survey at least has been incorporated in the petition (Sec. 11041). The proceeding is similar in principle to that before the Secretary of the Interior or before Commissioners in New York. Under these statutory requirements the Power Company adopted maps, plans, plats and profiles June 3, 1908 (Rec., p. 4), and negotiated for the required lands and brought suit therefor June 5, 1908 in the Probate Court of Summit County (Rec., p. 5). In 1909 it amended and extended its original plan pursuant to G. C. 8719, and in 1911 it negotiated with other land owners and filed suits pursuant to its original maps and plans as amended (Rec., p. 5), and these maps and surveys were adjudicated as specific as to the property then under appropriation by the Circuit Court of the Eighth Circuit Oct. 27, 1911, and by the Supreme Court Jan., 1912 (Northern Realty Co. v. Cuyahoga River Power Co.. 88 O. S., 616). The entire plan of the Power Company was definitely fixed and the original charter grant was anchored by the "Conservation Map" referred to in the record, page 5, a copy of which is filed herewith, which shows the termini and counties, and by reference to the engineer's reports, the location and height of dams, the location and acreage of reservoirs and the course and direction of the line. Appellee cannot well claim that the proceedings of the Power Company are inadequate, for under "Sheet 9," referred to in the Ordinance, copy of which we will produce at the hearing, the City relies on a

description which fixes a single point and that vaguely.

We repeat, the statutes of Ohio require, that when the corporation attempts to condemn the land necessary for its improvement it shall file a petition containing a "specific description" of the lands to be appropriated (Ohio General Code, §11042), and that in the appropriation proceeding it shall show the necessity for the appropriation (*id.*, §§11042, 11046). Obviously the petition could not be drawn until a definite location had been adopted, for otherwise it could not contain a specific description of the lands to be appropriated. It is equally apparent that the company could not show any necessity for any particular parcel of land unless it could show that it had definitely adopted a line of route. *It is, therefore, both a legal and a practical necessity that final location precede condemnation.* For this reason, if for no other, the idea that the route is not definitely and finally fixed until the land is actually purchased or condemned is obviously erroneous. The grant of eminent domain power is made to compel the sale, and the expropriator must prove the possession of the power or franchise, as appurtenant to a particular location, as a preliminary question before title can pass.

(d) *The adoption of the corporate resolution of necessity and condemnation concludes not only the corporation but also the courts and the private owners, save the cases of abuse of power, and the adoption of such resolution is the act which legally subjects the land to the public use, and is a law of the State.*

Another error in the theory of the lower court is its *failure to recognize that the corporation's adoption of its resolution is an act performed in*

the exercise of sovereign power delegated to it by the State and is a State law. It is in this respect that the theory contradicts the fundamental principles of eminent domain—the subserviency of the private title to the public welfare.

Ohio, like every other state, has always recognized that the power of eminent domain is public, not private; political, not judicial; and is vested in the Legislature, not in the courts or in the individual owners of the soil.

> *Giesy* v. *Cincinnati, W. & Z. R. R. Co.*, 4 Ohio St., 308.
>
> *Kramer* v. *Cleveland & Pittsburg R. R. Co.*, 5 Ohio St., 140, 146. 1855, per Justice Ranney.

As already stated, it always exists and may be exercised at any time, either directly or through the agency of corporations organized for the purpose. Its exercise "can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted" (*Kramer* v. *Cleveland & Pittsburg R. R. Co., supra*) and "IT REQUIRES NO JUDICIAL CONDEMNATION TO SUBJECT PRIVATE PROPERTY TO PUBLIC USES" (*idem*, p. 146).

It is, furthermore, an established rule, which appellee has heretofore insisted upon in this litigation, that "it is not upon the question of appropriation of lands for a public use, but upon that of compensation for lands so appropriated that the owner is entiled to a hearing in court and the verdict of a jury."

> *Zimmerman* v. *Canfield*, 42 Ohio St., 463, 471.
>
> *Cuyahoga River Power Co.* v. *Akron*, 210 Fed., 524, 527, per Judge DAY, and cases there cited.

The propriety and necessity for the appropriation are questions committed to the discretion of the agency in which the power of eminent domain is vested.

> *Giesy* v. *Cincinnati, W. & Z. R. R. Co., supra.*
>
> *Kramer* v. *Cleveland & Pittsburg R. R. Co., supra.*
>
> *Bowersox* v. *Watson,* 20 Ohio St., 496, 507.
>
> *Cincinnati* v. *Louisville & Nashville R. R. Co.,* 223 U. S., 390, where this Court, in a case involving the power of eminent domain in Ohio, said that when the use is public "the propriety or expediency of the appropriation cannot be called in question by any other authority."

It is true that under the present statute the necessity for the appropriation must be ascertained by the Court in advance of the impaneling of the jury which is to assess the compensation of the private owner (§11046), but the enactment of this statute did not establish a new condition to the exercise of the power of eminent domain, for the power is founded upon and is always limited by public necessity (*Giesy* v. *Cincinnati, W. & Z. R. R. Co., supra,* and *Powers* v. *Railroad Co.,* 33 Ohio St., 429), and the only power of the Court under the statute is to *prevent an abuse of power by the corporation.* The statute does not substitute the opinion of the Court for the opinion of the condemning party or give the Court power to overrule the corporation's discretion in determining the question of necessity where no abuse of power is shown.

Wheeling & Lake Erie R. R. Co. v. *Toledo Ry. & Ter. Co.*, 72 Ohio St., 368.
Bowersox v. *Watson*, 20 Ohio St., 496, 507.

It is evident, too, that the determination of the Court upon the preliminary questions specified in the statute does not *create* the right to appropriate or the necessity for the appropriation, but merely *ascertains* and *declares* the *prior existence* of the right and necessity.

When, therefore, the Legislature has vested a corporation with the power of eminent domain and that corporation resolves to exercise the power as against certain lands, neither the landowner, nor the Court, nor any third person, can deny or defeat the appropriation, save in the exceptional case where the corporation is proceeding in manifest and gross abuse of power, or, in other words, where it is proceeding without any authority at all.

What, then, is the effect of the resolution that the land is necessary and that the corporation "does hereby appropriate and condemn" the land? Clearly there is involved in such resolution a determination of the necessity and an immediate appropriation of the land to the uses of the corporation—not an appropriation in the sense of the acquisition of the title of the private owner, but an appropriation in the obvious and usual meaning of the word as a *setting apart* of the land for the use of the corporation, a *subjection of the land to the public use.* For that purpose, as we have already seen, NO JUDICIAL CONDEMNATION IS NECESSARY (*Kramer* v. *Cleveland & Pittsburg R. R. Co., supra*). The resolution, therefore, is conclusive upon everyone—corporation, court, landowner and third persons—unless, of course, its complete invalidity can be shown by showing an abuse of power. In the ab-

sence of such abuse the corporation's own selection of and determination to acquire the land by resolution, effectually subjects it to its will and sets it apart for its use, precisely the same as if the resolution, instead of being passed by the agent of the State pursuant to its delegated power *of eminent domain, had been enacted by the Legislature itself pursuant to its own sovereign power.*

This Court has frequently announced that the provision of the U. S. Constitution prohibiting a State from passing a law impairing the obligation of a contract is to be regarded *"as reaching every form in which the legislative power of a State is exerted whether it be a constitution, a constitutional amendment, an enactment of the Legislature, a by-law or ordinance of a municipal corporation or a regulation or order of some other instrumentality of the State exercising delegated legislative authority."*

Ross v. *Oregon*, 227 U. S., 150, at page 162, and cases there cited.

We can see no logical basis of distinction between the action of a municipal corporation in appropriating property to public use pursuant to a delegated legislative power, and the action of a public service corporation in doing exactly the same thing. They are each "instrumentalities of the State exercising delegated legislative authority." One acts through its council or governing body, the other through its directors, but both act entirely pursuant to authority from the legislature and in a matter which is primarily of necessity legislative.

A valid exercise of the eminent domain power must be a State law whatever the agency employed, otherwise the State does not make a valid delegation of the power.

In view of these numerous statutes and decisions, which truly express "the settled law of Ohio," there can be no escape from the conclusion that the doctrine of priority of location is neither occult nor arbitrary, nor the product of statutes having no counterpart in Ohio, but that it is, on the contrary, a simple and obvious application of the principles of eminent domain, which are the same in Ohio as in all other states, and is, indeed, a necessary corollary to the existence of the power itself.

(2) THE LIS PENDENS STATUTE OF OHIO EXPRESSLY RECOGNIZES THAT, WITH RESPECT TO THOSE PARCELS OF LAND AGAINST WHICH THE POWER COMPANY HAD CONDEMNATION PROCEEDINGS ACTUALLY PENDING, THE POWER COMPANY HAS A PROPERTY RIGHT WHICH CANNOT BE DEFEATED OR INTERFERED WITH.

> "G. C., Section 11,300. When the summons has been served or the publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, *as against the plaintiff's title.*"

The summonses had been served in the actions of the Power Company, and by the express language of the statute "the plaintiff's title" could not be interfered with. Obviously, the statute recognizes the existence of a title as to which interference was prohibited. The right of action itself is property.

> *Pritchard* v. *Norton*, 106 U. S., 132.
> *Searl* v. *School District*, 124 U. S., 197, 199.
> *Cincinnati* v. *Louisville, etc., Co.*, 223 U. S., 390, 400.

The decision in Powers *v.* Railway Co. (*su-*

pra) recognizes that the petition anchors the line named in the charter.

(3) THE POWER COMPANY IS THE OWNER AND THE PLAINTIFF IS THE MORTGAGEE OF RIPARIAN LANDS ALONG THE CUYAHOGA RIVER AND THE RIPARIAN RIGHTS APPURTENANT THERETO ARE PROPERTY.

After the commencement of its suit against the City the Power Company (proceeding as best it might in the face of the defendant's illegal interference with the accomplishment of its corporate purpose) acquired one-half of the site of the Gaylord Dam. (Keller property mentioned in Par. 19th of the Bill), two miles of the river bed at a point below the defendant's dam (the Boettler property mentioned in Par. 19th of the Bill) and the site of the Hiram Dam and a part of the Reservoir (the Morey and Rice parcels mentioned in Par. 19th of the Bill). These parcels of land were all acquired for use in connection with the company's enterprise. They are necessary, constituent parts of its plan and they were purchased for the purpose of carrying out its corporate business. The purchases were made, too, in accordance with the plan of development which was adopted by the Power Company in April, 1909 (Bill, Par. 19).

These parcels are riparian lands (Rec., p. 11) and have as appurtenant thereto the right to have the river continue to flow to, over and from them in the quantity, quality and manner in which it is accustomed to flow by nature, and this right itself is property within the meaning of the Constitution and cannot be taken even for a public use without the payment of compensation.

City of Mansfield v. *Balliett*, 65 Ohio St., 451.

United States v. *Cress*, 243 U. S., 316, 330, 331.

If the bill showed nothing more than an interference with the riparian rights appurtenant to the parcels of land already acquired by the Power Company, the plaintiff would be entitled to all the relief asked. Moreover, even according to the case cited by the Court below as expressing the settled law of Ohio, the right of a corporation to its location is definitely fixed when the line or route or place is "anchored" by the purchase of private titles. *The Power Company's place is therefore "anchored" by the purchase of the private titles above mentioned, located in three different counties, and at controlling points in the plan.* On what theory then can it be said that the Power Company has no rights legal or equitable save the obviously untenable theory that these private titles cease to be property when and because they were purchased by the Power company?

The true principle is that the private titles are now appurtenant to the entire grant and, by relation, the public use of these parcels is as of the date of the grant of the charter, as definitely fixed by the resolutions of appropriation. The Power Company would have no more perfect title as against defendants if it had purchased every title, within both grants.

(4) THE DECISION IN BELT LINE R. R. CO. V. T. & O. C. RY. CO. WAS CONTRARY TO THE EXPRESS TERMS OF THE CODE CITED ABOVE AND THE SETTLED RULE OF DECISION OF THE STATE COURTS UNDER THE CONSTITUTION OF 1802 AND 1851.

The Belt Line Co. owned a valid and binding grant from the State by the acceptance of its charter. The grant was accepted as a whole and not parcel by parcel as the lands

were purchased. No right existed to purchase and accept the grant pro rata (Railway Co. *v.* Elliot, 10 O. S., 57).

The grant to the Belt Line Co. was valid and binding from the moment of its acceptance and the grantee was protected during the initial stages of the enterprise (New York Electric Lines Co. *v.* Empire City Subway Co., 235 U. S., 179). *The grant was not a "float," but the record shows was anchored at both ends by the charter and in the middle by an adopted survey of the land of Innes as an integral part of the grant. The State located* the line on Innes land for its own public purposes and was thereafter estopped to deny its own grant. The purchase or attempted purchase of Innes land by the subsequent grantor or locator was an invasion of the most fundamental contract right of the Belt Line Co. and a permanent injunction should have been granted. This principle is settled by the State and Federal cases above cited. There was no adequate remedy at law. The Probate Court had no authority to hear and determine any other than the four preliminary questions, and no one of these involved the charter rights of the Belt Line Co. The Belt Line Co. owned the exclusive right to pay the compensation and take Innes' land by every authority, local and general.

As a practical matter, where would the corporation get its funds to buy lands for an unlocated line? The statutes do not contemplate that subscribers for stock are members of a blind pool for a line to be located *anywhere*. Of course the directors could not raise a dollar for such a scheme.

PART SECOND.

The impairment of the contract and the taking of property without due process of law.

A. THE ORDINANCE IS A STATE LAW WHICH IMPAIRS THE OBLIGATIONS OF THE CONTRACT.

It is settled that the appellee's ordinance under which it is acting is a State law and that the acts of the appellee are the acts of the State.

> *Cuyahoga River Power Co.* v. *Akron*, 240 U. S., 462, 464.

Upon its face the ordinance appears to be an exercise of the power of eminent domain, and, of course, we concede that a *legitimate* exercise of the power of eminent domain is not an impairment of a contract.

> *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S., 685.
>
> *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S., 390.

But this Court must consider, not only the face of a law, but, also, the manner of its administration; and if the law *as administered* impairs a contract is must fail.

> *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S., 478, 494.
>
> *United States* v. *Reynolds*, 235 U. S., 133, 148.
>
> *McCabe* v. *Atchinson, F. & S. F. Ry. Co.*, 235 U. S., 151, 160.

In the case at bar, the ordinance appears to provide for compensation (see Sec. 2 at Rec., p. 13); but no compensation has been paid and no steps have been taken to assess the compensation and the City claims it is under no duty to pay (Rec., pp. 15 and 20). Hence, the law as actually

administered in this case is *not* a legitimate exercise of the power of eminent domain and cannot be sustained on that ground.

One of the obligations of the Power Company's contract is that the State will not prevent the company from constructing and operating its plant.

Reagan v. *Farmers L. & T. Co., supra.*

And as the necessary effect of the ordinance as administered is to prevent such construction and operation it follows, as of course, that the contract is impaired.

See, also,

Detroit United Ry. v. *Detroit*, 242 U. S., 238, 247.

B. THE APPELLLEE'S DIVERSION OF THE WATER OF THE RIVER AS AGENT OF THE STATE CONSTITUTES A TAKING OF THE POWER COMPANY'S PROPERTY.

In the opinion of the Court below it is said (Rec., p. 48):

> "There is no allegation that any part of the land which the Power Company owns is actually invaded by any of the constructions of the defendant, and the real substance of the complaint is that the Power Company's *project* of utilizing the waters of the Cuyahoga River and many other streams for many miles will be impaired by the City's use of the water of the river as threatened."

The charter and the amendment thereto were duly accepted by the Power Company and were, as we have shown, valid and binding from the moment of acceptance. These grants covered water rights and powers and reservoir lands which united and developed can produce over 52,000,000 k. w. hours of electricity per annum.

This is, as the court below says, the "*project*"

of the Power Company, and that *project* the defendant has absolutely destroyed. There is no question that a valid grant by the State to a public service corporation is property and that the several franchises by which it performs its functions are also property.

Neither can there be any question as to extent of the taking by appellee. The Power Company had devoted *all* the waters of the Cuyahoga River to the development of hyrdo-electric power by plans involving the immediate use thereof by the public. When, therefore, appellee appropriated *all* the same waters to its own use, the taking is not partial but total. The appellant is physically excluded from his grant and such exclusion has always justified the relief herein prayed for (see cases cited, pp. 30-31, *supra*).

Nor can there be any doubt that appellee believed the property of great value, for it has expended several millions in developing the Cuyahoga River.

C. THE TAKING IS WITHOUT DUE PROCESS OF LAW, BECAUSE NO COMPENSATION HAS BEEN PAID AND BECAUSE THE TAKING IS FOR A PRIVATE USE.

1. *Lack of compensation.*

The bill expressly alleges that the City has not and does not intend to institute any proceeding to assess compensation, but intends to take the Power Company's property and rights without compensation and asserts and claims that it is authorized and empowered to proceed without any such payment (Rec., pp. 15 and 20). And it is, of course, well settled that a taking without compensation is a taking without due process of law.

Consolidated Turnpike Co. v. *Norfolk, etc., Co.*, 228 U. S., 326, 330.

Chicago, B. & Q. R. R. v. *Chicago*, 166 U. S., 226.
Appelby v. *Buffalo*, 221 U. S., 524.
United States v. *Cress*, 243 U. S., 316, 330.

2. *Private use.*

Of course we do not claim that a taking of water for the purpose of municipal supply is not in itself for a public use if authorized by a valid statute. The allegation here is that the defendant is actually taking approximately *ten times as much as it will or can apply to any legitimate public use at any time within the next thirty-five years* (Bill, Par. 26th); and even aside from the averments of the bill, which upon this appeal must be taken as true, the Court may judicially know, as a fact of common knowledge, that no municipality of the size of the defendant can possibly have any legitimate public use for anywhere near as much as 194,000,000 gallons of water per day, which is the average flow of the river at the point specified in the defendant's ordinance.

It is a recognized fact, known to all authorities upon municipal water supply, that an allowance of 100 gallons per capita per day is ample for all needs; so that aside from the supply which the defendant can and should obtain from the watersheds upon which it is located (Bill, Par. 27th), it is apparent that "all the waters of the Cuyahoga River" is a vastly greater quantity than the defendant can possibly use for any public purpose, and its taking of this quantity must be for a private use.

It was admitted in argument below that "of course the City cannot divert or use more water than it is authorized to use for legitimate public purposes," and the attempt was made to escape the force of our position on this point by the state-

ment that the Court "will not, however, in advance anticipate that the City will take more than from time to time is so required upon the speculation of the plaintiff as to future necessities."

But a city does not speak except by its Council (*Boise Water Co.* v. *Boise City*, 230 U. S., 85-90), and what it is taking must be determined by the terms of its ordinance. That ordinance expressly states that the City "hereby appropriates *all* the waters of the Cuyahoga River;" and the averments of the bill as to the quantity of that water and the amount the City can actually use are not "speculations of plaintiff" but averments of fact which stand admitted upon this record.

The fact that the taking is for a private use is in itself sufficient to sustain the bill and entitle the plaintiff to relief. For it is everywhere recognized that there does not exist anywhere in anyone any authority to take the property of another person for a private use. The State itself cannot do it and the Legislature cannot authorize it, and whenever it is attempted there is always the right to invoke the power of the Federal Courts to prevent it, either by direct suit or by writ of error to the State Court.

Union Lime Co. v. *Chicago, etc., Co.*, 233 U. S., 211, 218.

Fallbrook Irrigation District v. *Bradley*, 164 U. S., 112.

Clark v. *Nash*, 198 U. S., 361.

Traction Co. v. *Mining Co.*, 196 U. S., 239, 247, 251, 252.

The State Court, too, has repeatedly recognized that the State Constitution, also, "clearly prohibits the taking of private property for private use without the owner's consent."

Shaver v. *Starrett*, 4 Ohio St., 494, 498.

Reeves v. *Treasurer of Wood Co.*, 8 Ohio St., 333.

Smith v. *Atlantic & Great Western R. R.* Co., 25 Ohio St., 91.

Cincinnati v. *Railroad Co.*, 88 Ohio St., at p. 294.

PART THIRD.

The City's lack of power under the State Constitution and statutes to take the Power Company's property.

It should not be necessary, under the Ohio Constitution requiring payment of money in advance, and where the facts show that a corporation vested with the power of eminent domain and under color thereof has confiscated every right, title and interest of another corporation, and has refused for over four years to pay any money whatever and denied the obligation to pay, to consume any time in present discussion of what the rights of the city would have been and what proceedings the constitution and statutes would have required if it had undertaken to appropriate the property of appellant, as it was expressly required to do by constitution and statute.

We submit the following argument to show the utter hopelessness of appellant's position even if defendant should now attempt to comply with the law under mandate of this Court. Appellee has no statutory authority to continue the construction of its plant. If it had the authority, the ordinance of council would be subject to referendum and might, of course, be voted down. If the vote carried, however, and just compensation

were awarded the Power Company, the appellee cannot obtain under the debt restrictions any substantial amount and there is no prospect that it can obtain the funds within many years to come. The blind and unreasoning confiscation of defendant has led it into an impasse.

A. THE STATUTES UPON WHICH THE CITY BASES ITS RIGHTS AND UNDER WHICH IT IS PROCEEDING HAVE BEEN REPEALED BY AN AMENDMENT TO THE OHIO CONSTITUTION, AND ITS ACTS ARE THEREFORE WITHOUT ANY LEGAL SANCTION OR AUTHORITY WHATEVER.

A constitutional convention was held in Ohio in 1912. The initiative and referendum in both State and municipal legislation were among the prominent ideas which controlled that convention, and radical changes in the existing law of the State were intended and have been effected. Among the amendments passed by the convention and adopted by vote of the people on September 3, 1912, is Article 18, which is entitled and deals with "Municipal Corporations."

Prior to the adoption of this amendment the statutes of Ohio vested in municipal corporations exceedingly broad powers with respect to public utilities, including the power to appropriate for water supply purposes "any property or right or interest therein *theretofore acquired by any private corporation for any purpose* by appropriation proceedings or otherwise, *either within or without the limits of the corporation*" (Ohio General Code, Sec. 3677, *as amended in March, 1910*, and Sec. 3678). The statute provided that when it was deemed necessary to appropriate property the *Council* should "pass a resolution, declaring such intent, defining the purpose of the appropriation, setting forth a

pertinent description of the land and the estate or interest therein desired to be appropriated" (Sec. 3679). Notice of the resolution was required to be given, and thereupon the *Council* might "pass an ordinance by the votes of two-thirds of all members elected thereto, directing such appropriation to proceed" (Sec. 3680). Upon the passage of such an ordinance proceedings in court to assess the compensation were to be taken (Secs. 3681, 3697). *It will thus be observed that under the statute the entire power and control over the construction and acquisition of public utilities was vested in the City Council; and as indicated above, it was an enormous power.* It is not surprising that the people should undertake to limit it.

By the constitutional amendment adopted in 1912, it is provided:

> "Section. 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.
>
> "Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and *no such ordinance shall take effect until after thirty days from its passage.* If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordi-

> nance it *shall not take effect until submitted to the electors and approved by a majority of those voting thereon.* The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a Charter Commission."

The amendment expressly provides that all existing laws "not *inconsistent* therewith" shall continue in force until amended or repealed (see Schedules at end of amendments). And the State Court has decided that by the adoption of the amendment all existing laws *inconsistent* with it were *repealed.*

> *State* v. *Cameron,* 89 Ohio St., 214, 219; 106 N. E., 29.
>
> *Dravo-Doyle Co.* v. *Village of Orrville,* 93 Ohio St., 236; 112 N. E., 508.
>
> *Shryock* v. *City of Zanesville,* 92 Ohio St., 375; 110 N. E., 927.

The test adopted by the State Court in determining the question of consistency is: Has the Legislature under the new Constitution the present right to enact statutes substantially like those claimed to be repealed? (89 Ohio St., 223.) In applying this test in *State* v. *Cameron, supra,* the Court said:

> "If the statute exceeded the power conferred by the Constitution, then to the degree of the excess clearly that must fall by reason of repugnance."

Under the test adopted by the State Court, and, indeed, under any sound principle of statutory construction, the inconsistencies between the statutes and the amendment are obvious and apparent.

There is, of course, no doubt that the words "public utility" as used in Section 4 of the amend-

ment include systems for supplying municpalities with water; and, therefore, in providing that municipalities may acquire, construct, own, lease and operate "any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants" the amendment is clearly dealing with a subject embraced in Section 3677 of the Code.

By Section 5, however, *the unlimited power of the Council over the acquisition and construction of such utilities is taken away.* A referendum to the people is secured. No ordinance for the acquisition or construction of a public utility can take effect until thirty days after its passage; nor can it ever take effect until submitted to and approved by the people if ten per cent. of the electors of the municipality request such submission. Under the *statute* the necessity for or expediency of the acquisition or construction—the determination of whether the utility shall or shall not be acquired or constructed—is vested solely, exclusively and finally in the *Council.* Under the *amendment* these questions are subject to the action of the *people.* The Council can no longer appropriate property or commit the municipality to expense for that purpose by their own fiat.

In addition to this, Sections 6 and 10 of the amendment provide for the appropriation of an "excess" and for the sale of such excess; Section 11 authorizes the assessment of benefits to help pay for the improvement; and Section 12 authorizes bonds to be issued to an amount beyond the limit fixed by law and under provisions which may result in the City's utility being sold on foreclosure to a private purchaser. The statutes provide for none of these things.

The precise effect of all these radical changes need not be now determined. It is sufficient here

that *the basic and fundamental question of whether or not the utility shall be acquired or constructed at all is now subject to a referendum to the people and cannot be determined by the Council alone.*

The Legislature could not, under the amended Constitution, pass a statute giving the City Council the complete power and control over the acquisition and construction of public utilities which was vested in the Council by the statutes existing at the time the amendment was adopted. In other words, the Legislature has not "the present right to enact statutes substantially like" those under which the defendant is acting. And under the repeated decisions of the State Court, cited above, it is clear that those statutes are inconsistent with the Constitution and have been repealed by it.

In *Shryock* v. *City of Zanesville, supra,* it appeared that in March, 1914, the City Council passed a resolution directing the Public Service Director to employ an engineer to prepare plans, specifications, and estimates of cost for the erection and construction of a filtration plant for purifying the water supply of that city. It was claimed that this resolution was the first step toward constructing and operating a public utility within the meaning of Sections 4 and 5 of Article XVIII of the Ohio Constitution as amended in 1912. It appeared, however, that the City already had established and in operation a complete water supply system and that the resolution in question was adopted, pursuant to orders from the State Board of Health, for the purpose of purifying the water which was then being obtained through that existing system. The Court thus regarded the proposed filtration works as "a mere incident to the utility already

established and in operation," and for this reason it was held that the provisions of Sections 4 and 5 of the Amendment of 1912, were not applicable. But the Court then said:

> "If, under the guise of repairing or improving a public utility, any municipality would attempt by resolution to substantially reconstruct a utility, even though municipally owner, and do this *without observing the provisions of Section 5 of Article XVIII*, the Courts of Ohio, no doubt, would be found open and ready to *prohibit any such manifest abuse of the power*."

It is, of course, obvious from the bill in the case at bar that the appellee is not repairing or improving or even reconstructing an existing plant. She is acquiring a *new* utility. She is embarking upon an entirely new enterprise in a new and distant watershed, and thus comes within the scope of this statement by the Supreme Court of the State that municipalities may not now acquire or construct or "substantially reconstruct" a public utility without observing the provisions of Section 5 of the amendment.

In *Dravo-Doyle Co.* v. *Village of Orrville, supra*, the suit was to recover the balance due for certain machinery furnished to the village in connection with an electric lighting plant erected by the village. The defense was that, in a suit brought against the village by an existing electric light company, the village had been enjoined from proceeding with the erection of its plant because it had failed to comply with Section 3990 of the Ohio General Code, which gave authority for the erection of electric lighting plants but provided that in villages where electical works had been already erected under an existing franchise the Council should pur-

chase such existing works or appropriate them under the power of eminent domain. The Supreme Court held that this latter provision of Section 3990 of the General Code was *unconstitutional and void because inconsistent with Section 4 of Article VIII of the Ohio Constitution as amended in 1912.* The Court said:

> "The Constitutional Convention was not content to leave the subject of the public utilities of the cities and villages of the State entirely to legislation. It wrote into Article XVIII—the Home Rule Amendment—specific provisions touching that subject, including authority to acquire and operate such utilities, and a specific and independent clause *securing the referendum and defining the mode of its exercise.* * * *
>
> "The provisions of Section 5 of that article *prescribe the manner in which the municipality may exercise the power conferred* and contain a special provision for a referendum. These provisions are explicit and they confer plenary power upon the municipality to deal with the subject matter involved in this controversy.
>
> "It is provided in the schedule to the Constitution, as amended in 1912, that all laws then in force not inconsistent therewith shall continue in force until amended or repealed; and it is familiar doctrine, well settled, that all repugnant statutes are repealed by implication. *All laws then in force which were inconsistent with the new Constitution fell because they were inconsistent.*"

Reference was then made to the limitation in Section 3990 of the Code upon the authority of villages where electric works have already been erected, and it was then said:

> "This limitation is wholly inconsistent with the plenary grant of power contained in the article of the Constitution referred to, and *the statute, so far as this inconsistent pro-*

vision is concerned, fell simply because it was inconsistent."

As the amendment thus makes void all existing laws *limiting* the powers conferred by the amendment, it must, also, make void all existing laws which *omit* the limitations and conditions prescribed by the amendment. For the absence of limitations and conditions contained in the amendment makes the law quite as inconsistent with the amendment as the presence of limitations and conditions not contained in the amendment; and it is the *inconsistency* between the existing law and the amendment which operates to repeal the law, regardless of whether the inconsistency arises because the statute is broader or narrower than the amendment. As said in *State* v. *Cameron*, "If the statute *exceeded* the power conferred by the Constitution, then to the degree of the excess clearly that must fall by reason of the repugnance."

There can be no doubt, therefore, that the right of the appellee to proceed with its project of utilizing the Cuyahoga River as a source of municipal water supply under the ordinance in this case was ended by the constitutional amendment.

It will be argued by the defendant that the amendment does not affect its proceeding for the reason that its resolution and ordinance were passed by its Council before the amendment became effective, and this is the real point upon which it seeks to escape the effect of the repeal.

The resolution was passed May 27, 1912, and the ordinance on August 26, 1912, but the latter did not take effect until September 10, 1912 (Bill, Pars. 20th, 21st). The constitutional amendment was adopted September 3, 1912, and took effect November 15, 1912 (Bill, Par. 25th), except that it was provided that all cases pending in

the Courts on January 1, 1913, should be heard and tried in the same manner and by the same procedure as was authorized by the law in force at the time of the adoption of the amendment (Bill, Par. 25th). *It contains no other saving clause.*

But although the defendant passed its ordinance, it had not, on November 15, 1912, acquired or constructed or contracted for the acquisition or construction of the public utility which it is now engaged in acquiring and constructing, nor did it, on January 1, 1913, have any case pending in any Court for the appropriation or acquisition of any property to be used by it in the acquisition or construction of its public utility (Bill, Par. 25th).* Indeed, its ordinance, in consequence of its omission of a "pertinent description of the land, and of the estate or interest therein desired to be appropriated" (Ohio Code; Sec. 3679), is void, and the city was not yet committed to, or obligated for, the expenditures necessary to be made in order to carry the ordinance into effect.

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*The language of Section 4 of the amendment:

> "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants,"

undoubtedly applies both where the city seeks to physically construct a plant and where it seeks to take over from a private corporation a plant already existent. For the purposes of this bill it is immaterial whether the city's acts be viewed from the standpoint of constructing a public utility of its own or from the standpoint of acquiring the public utility of the Power Company. Whichever view be taken, it is plain that the utility had not been acquired or constructed when the amendment took effect, for it had neither instituted an appropriation proceeding against the Power Company nor commenced physical construction of its own works.

City of Bremerton *v.* Noth. Pac. P. S. Co., *et al.*, 243 Fed., 980.

Even though it be assumed for the purpose of the argument that the ordinance was valid under the old law, the ordinance cannot stand in any better position than the statute under which it was enacted. The statute having been repealed, the ordinance fell with it.

In *Flanagan* v. *Sierra County*, 196 U. S., 553, the rule was stated by this Court, as follows:

> "The general rule is that powers derived wholly from statute are extinguished by its repeal. Sutherland on Statutory Construction, Section 165. And it follows that *no proceedings can be pursued under the repealed statute, though begun before the repeal*, unless such proceedings be authorized under a special clause in the repealing act."

This rule has been repeatedly applied in cases where municipalities were attempting to proceed under an ordinance which, though valid when passed, had been affected by subsequent statute or constitutional provision.

A leading case is *Swift & Co.* v. *Newport News*, 105 Va., 108, 52 S. E., 821, 3 L. R. A. (N. S.), 404. The suit there was to recover damages sustained in consequence of a change in the grade of a street, the liability of the city being founded upon a provision of the Virginia Constitution which became effective July 10, 1902. It was contended by the city that because the ordinance under which the change was made was enacted before the Constitution became effective it was not liable to make compensation therefor. In other words the contention was, as stated by the Court,

> "that, although the ordinance under which the work is done, if enacted at this time, would be unconstitutional, or at least could not be put into operation by doing the work

> without providing for just compensation, such an ordinance passed before the present Constitution became operative, which was carried into effect after by bringing the street to the grade established by it and inflicting damage upon plaintiff-in-error's property, is valid authority for doing the work, because when it was passed it would have been lawful to have performed the work without rendering compensation."

This contention was rejected and the City was held liable. In so holding, the Court said:

> "To give a city ordinance passed prior to July 10, 1902, the effect here contended for would, as it appears clear to us, make the constitutional provisions we have under consideration meaningless.
>
> "'A law cannot be in force in the State, no matter when passed, which contravenes the provisions of the Constitution of the state' People *ex rel* Rockford *v.* Maynard, 14 Ill., 419."

It was further said:

> "We have been unable to find a case where it is held that where an ordinance establishing a grade is passed prior to the adoption of a Constitution affording protection against damage in such cases, and no work of grading was done under the ordinance until after the adoption of the Constitution, the plaintiff cannot recover because the grade ordinance was passed before the Constitution became effective. There are, however, a number of cases to be found taking the opposite view, and among them the following: *Ogden* v. *Philadelphia,* 143 Pa., 430, 22 Atl., 694; *O'Brien* v. *Philadelphia,* 150 Pa., 589, 30 Am. St. Rep., 832, 24 Atl., 1047; *Johnson* v. *Parkersburg,* 16 W. Va., 402, 37 Am. Rep., 779."

After referring to these and other cases the Court concluded that the ordinance and the city charter pursuant to which it was passed

"are inconsistent with said provisions of the new Constitution, and are to that extent repealed."

In *City of Bloomington* v. *Pollock*, 141 Ill., 346, an ordinance fixing the grade of a street was passed before the enactment of a constitutional provision imposing a liability upon the city for damages resulting from such changes of grade. It was contended that by reason of the fact that the ordinance thus antedated the constitution there was no liability upon the city for damages caused by actually grading the street, in accordance with the ordinance, after the constitution went into effect. This contention was rejected, the Court pointing out that if the ordinance carried with it immunity from making compensation, *then it was inconsistent with the constitution and was therefore repealed by necessary implication.*

In *Mitchell* v. *Illinois, etc., Co.*, 68 Ill., 286, the Court followed and approved an earlier case to the effect that a constitutional provision requiring compensation to be assessed by a jury repealed, as of the time of the adoption of the constitution, all existing statutes providing a different method of assessing damages. Pursuant to this doctrine it was held that proceedings had under such statute after the constitution had become effective would not justify an entry upon the land.

In *County of Menard* v. *Kincaid*, 71 Ill., 587, a proceeding to lay out a public road was commenced by County Commissioners. The damages were assessed and the land owner appealed. A separate order laying out the road and declaring it to be a public highway was then made during the pendency of this appeal. At this stage—before the appeal had been determined and before the time to appeal from the order declaring the road to be a public highway had expired—the statute

under which the proceedings were had was repealed. The Court held that *the effect of this repeal was to annul all that had been done toward laying out the road.*

In *Matter of Ludlow Street*, 172 N. Y., 542, certain property owners, pursuant to the City charter, filed a petition with the Council praying that a street be laid out across a steam railroad track. The petition was referred to the Board of Street Opening, which subsequently reported in favor of the petition. The City thereupon took further proceedings, in accordance with its Charter, to lay out the street. In the meantime, however, the general railroad law was amended so as to provide that the railroad over whose track it was proposed to lay out a street should have notice of the proceeding and an opportunity to be heard. It was held that this amendment was controlling; and *all proceedings had subsequent to the adoption of the amendment were vacated because of their failure to comply with the terms of the amendment.*

In *City of St. Louis* v. *Lang*, 131 Mo., 412, it was held that where an ordinance providing for a change of grade was passed before the adoption of the constitution and the constitution went into operation before the change was actually made, the provisions of the constitution would control.

In *Commonwealth* v. *Beatty*, 1 Watts, 382, the County Court had appointed viewers to assess the damages occasioned by the building of the Pennsylvania Canal. The statute under which the Court acted was then repealed, and a subsequent report and assessment made by the reviewers was held illegal because of this repeal. The Supreme Court of Pennsylvania said that by the repeal all jurisdiction of the Court and viewers was taken away and

> "hence all the proceedings subsequent to that time, *although done only for the purpose of finishing what had been previously and rightfully commenced, are irregular and must be quashed.*"

In *Hampton* v. *Commonwealth*, 19 Pa. St., 329, an act had been passed authorizing an extension of a street in Pittsburgh and providing for the assessment of damages on lots in the vicinity of the extension. The damages were assessed and the report of the viewers confirmed. Before the action authorized by the statute to collect the damages had been commenced the statute was repealed. This repeal was held to render void all proceedings had under the statute and to prevent a recovery of the damages.

These cases (illustrating the rule universally recognized that, in the absence of a saving clause in the repealing statute, proceedings commenced under the repealed statute cannot be completed after the repeal) conclusively show that the fact that the appellee's ordinance was passed before the constitutional amendment took effect does not affect the question in the least, and that, the repeal having become effective before the utility was either constructed or acquired, all power to acquire or construct it, save in accordance with the method prescribed by the constitution, immediately terminated when the amendment took effect.

An ordinance declaring that certain property is "hereby appropriated" for water supply purposes and directing proceedings to carry out such appropriation, is the same in nature, purpose and effect, as an ordinance fixing the grade of a street and directing that the street be graded in accordance therewith. No distinction can be drawn between the two, and as the latter cannot

survive a change in the Constitution it is clear that the former cannot.

The inevitable conclusion is that from and after November 15, 1912, the City of Akron has had no power whatever to acquire property for water supply purposes except in accordance with the terms of the amendment, or, in the language of the Supreme Court of Ohio, "without observing the provisions of Section 5 of Article XVIII" (*Shryock* v. *Zanesville, supra*).

The Power Company's property not having been acquired by the City before that date, and no proceeding for such acquisition having been instituted, it follows that it cannot now be acquired without a referendum with the probability that the project would fail of the necessary majority, if for no other reason because the city has reached its debt limit. Nor is the property of the Power Company subject to the appropriation of appellee.

B. THE CITY'S ACT IN DIVERTING THE WATERS OF THE CUYAHOGA RIVER IS AN UNREASONABLE AND UNNECESSARY INTERFERENCE WITH PROPERTY ALREADY DEVOTED TO A PUBLIC USE AND IS A MANIFEST AND GROSS ABUSE OF POWER. IF AUTHORIZED BY THE STATUTE THEN THE STATUTE IS UNCONSTITUTIONAL.

The Supreme Court of Ohio has declared:

> "It is the settled policy of this State to protect from unnecessary interference or destruction a public use already acquired in property."
>
> *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 88 Ohio St., 283, 295; 102 N. E., 951;
>
> *Rockport* v. *Railroad Co.*, 85 Ohio St., 73, 82.

The bill in the case at bar distinctly avers, and it is obvious from the facts alleged, that a taking of all the waters of the Cuyahoga River by the defendant would constitute an unreasonable and unnecessary interference with the public use to which that property has been already devoted by the Power Company (Bill, Pars. 26th, 27th); and under the settled rule in Ohio stated above these averments make out a cause of action for an injunction.

In each of the cases last cited an application for the appropriation of property was denied upon the ground that such appropriation would constitute an unreasonable interference with an existing public use; and in *P. C. C. & St. L. Ry. Co.* v. *City of Greenville*, 69 Ohio St., 487, an injunction to restrain such an unnecessary interference with property already devoted to a public use was granted.

It is thus authoritatively settled that upon this ground alone the decree appealed from should be reversed.

It is claimed, however, that the statute under which the City purports to act (Ohio General Code, Sections 3677, 3697) authorizes the City Council to "appropriate such property as it may determine to be necessary" (Sec. 3679), and that the Council's determination of the necessity for the appropriation of "all the waters of the Cuyahoga River" is conclusive and not reviewable by the Courts except in the case of fraud. And this, it may be noted, is the view expressed by the District Court in the suit brought by the Power Company (210 Fed., 524, at p. 527).

Even if this rule be correct, the bill here should be sustained, for it charges fraud and conspiracy with sufficient definiteness to admit proof of the facts (Bill, Pars. 27th, 28th; Record, pp. 17, 18).

But aside from these averments we contend that the question of the necessity for the appropriation may be reviewed by the Court *where, as here, the property sought to be taken is not within the express terms of the grant or essential to its effectiveness and the appropriation would in fact constitute an unnecessary and unreasonable interference with property already devoted to a public use,* or in other words, where the city is proceeding in *manifest and gross abuse of power,* even though its acts may not amount to actual fraud.

It is true that Section 3679 of the Ohio General Code provides that "for waterworks purposes and for the purpose of creating reservoirs to provide for a supply of water, the Council may appropriate *such property as it may determine to be necessary.*" This provision was not a practical menace to the rights of other persons prior to 1910, because up to that time municipal corporations had simply a general power to appropriate property for water supply purposes (see Ohio General Code, Sec. 3677, exclusive of Subdivision 13 thereof). In that year, however, Section 3677 was amened by the addition of Subdivision 13 (see 101 Ohio Laws, p ; Bill, Par. 23rd), whereby municipalities were authorized to appropriate for water supply purposes "any property or interest therein *theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise.*" In other words, by that amendment the eminent domain powers of municipalities were *so increased as to authorize them to appropriate property already devoted to a public use;* and thus the practical effect and operation of Section 3679 (up to the time of its repeal by the Constitutional Amendment of 1912) was to vest in the Council of every town and village in the State

no matter how insignificant, unlimited power to appropriate *any property*, even though that property be already devoted to a public use, and although such appropriation would utterly destroy that use, and although the municipality may be in a position to supply itself with water from other equally good sources without interfering with any other public use. As an illustration, under that statute a village of five hundred persons might appropriate the right of way of the Pennsylvania Railroad; and according to the contention of the defendant here, no court could interfere with the Council's determination that such appropriation was necessary.

Fortunately this is not the law of Ohio. It has long been settled in that State that the Courts may prevent a manifest and gross abuse of the power of eminent domain.

> *Giesy* v. *Cincinnati, W. & Z. R. R. Co.*, 4 Ohio St., 308;
>
> *Kramer* v. *Cleveland & Pittsburgh R. R.*, 5 Ohio St., 140, 146.

And in its latest decision the Supreme Court of the State has said that any statute which attempts to prevent a review of that question by the courts is in conflict with Section 16 of Article I of the Ohio Constitution.

> *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 88 Ohio St., 283.

In that case the Supreme Court of Ohio had before it a statute which provided that "If it be necessary in the judgment of the Board of Directors of any domestic or foreign corporation owning or operating a railraod wholly or partly within the State of Ohio to use and occupy for an elevated track any portion of any public ground * * * such company may appropriate

an easement over so much of such ground as may be necessary for such purposes." It was argued that that statute authorized the Board of Directors to determine the necessity for the appropriation, that its judgment in that respect was final, and that no court could review it. With reference to that contention the Court said (p. 293):

> "If the construction of this section contended for by counsel for the Louisville & Nashville Railroad Company were to obtain, then the section is clearly unconstitutional. Section 16 of Article I of our Constitution provides that: 'All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.'"

This is a clear recognition by the highest Court of the State that any statute which authorizes an appropriation of property without the possibility of a judicial determination of the question whether such appropriation would unnecessarily interfere with an existing public use is contrary to the Constitution of the State.

Under such a statute, the defendant here assumes to take and divert *ten times as much water as it needs*, although the property sought to be taken is *not within the express terms of the grant or essential to its effectiveness* and although such taking would *unnecessarily interfere with an existing public use*. It needs no argument to show that where under color of authority of an unconstitutional statute a municipal corporation is taking the property of another owner when without such statute there would be no right to take, such taking is without due process of law and hence in violation of the Federal Constitution also.

PART FOURTH.

The Right to Injunctive Relief.

A. THE CITY'S FAILURE AND INABILITY TO PAY COMPENSATION FOR THE PROPERTY OF THE POWER COMPANY TAKEN BY IT GIVES RIGHT TO AN INJUNCTION.

The Constitution of Ohio, unlike many other constitutions, does not recognize the liability of a municipality or subdivision of the State as affording sufficient security for the payment of compensation for property taken under an exercise of the power of eminent domain. It provides that the compensation

> "shall *first be made in money*, or *first secured by a deposit of money;* and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."
>
> *Ohio Constitution*, Article I, Section 19.

The same provision is repeated in the statutes with relation to appropriation of property by municipal corporations.

> *Ohio General Code*, Sections 3686 and 3691.

The bill here shows that the defendant *has not paid the compensation nor taken any proceeding to assess the compensation*, but on the contrary asserts and claims that it is authorized and empowered to do the acts complained of without acquiring any of the property of the Power Company and without paying any compensation whatsoever (Bill, Pars. 24th, 31st, 32nd). The bill further shows that the defendant has actually entered upon and taken exclusive possession of the river (Par. 30th).

There is thus a clear and palpable violation of the Constitution in permitting the defendant to proceed.

In addition to all this, the bill alleges that the defendant is

> "without funds with which and is financially unable to pay the damages which will be caused to said Power Company by a diversion of the waters of the Cuyahoga River in accordance with the announced plan and intention of the defendant, or to pay any reasonable or substantial compensation for the property of said Power Company of which said defendant is depriving said Power Company; and said defendant has not made any provision for raising or obtaining the money necessary to pay such damages and compensation and by reason of the debt limit fixed by the statutes and Constitution of Ohio said defendant is and will be unable to raise or obtain the money necessary for that purpose" (Bill, Par. 32).

The learned court below announced that it "WOULD REFUSE, IN OBEDIENCE TO ANY TECHNICAL RULE TO ACCEPT AS TRUE ANY SUCH ALLEGATIONS;" and it even went so far as to say that "the City of Akron is not insolvent, but is abundantly able to pay, and in the judgment of this Court desires to pay any claims which it may justly owe" (Record, p. 48).

We respectfully insist that no court is at liberty to so disregard the averments of a bill upon a motion to dismiss, and assume their contrary as true, especially when the matters alleged are open and officially admitted and sworn to.

So far as the plaintiff's rights rest upon the Constitution of Ohio, it is immaterial whether the City be financially able to pay or not—the plain requirement of that Constitution is that it shall *pay first and take afterwards.* And as the State of Ohio does not regard the credit of its cities as

sufficient security, there is no reason why this Court should do so.

But these allegations of the bill with respect to the financial position of the city clearly show *the hopelessness of the plaintiff's situation and the absolute certainty of his being deprived of his property without due process of law unless equitable relief be obtained.* The averments of the bill upon this point are averments of *fact,* and the due process clause of the Fourteenth Amendment cannot be enforced except by enjoining the defendant.

It is important to note, too, that the Supreme Court of the State itself enforces its own Constitution by enjoining the taking until the compensation is paid.

> *Zimmerman* v. *Canfield,* 42 Ohio St., 463.
> *Callen* v. *Electric Light Co.,* 66 Ohio St., 166.
> *Schaaf* v. *Railway Co.,* 66 Ohio St., 215.
> *Hamilton G. & C. Traction Co.* v. *Hamilton & L. Electric Transit Co.,* 69 Ohio St., 402.

In each of these cases an injunction was awarded to restrain the taking (the taking in the last-named case consisting of an interference with a franchise) *unless and until the compensation were assessed and paid.* Under these decisions, it is plain that the allegation that the defendant is proceeding with the taking of the Power Company's property *without the advance payment of compensation therefor* is sufficient to constitute a cause of action for an injunction.

B. THE RIGHT TO AN INJUNCTION EXISTS UNDER THE GENERAL PRINCIPLES OF EQUITY.

We submit the statement of Mr. Lewis on this question as follows:

"The grounds upon which equity takes jurisdiction in such cases are not always plainly defined and differ in different jurisdictions. Perhaps a majority of the cases are put upon the ground of irreparable injury and the consequent lack of an adequate remedy at law. In a few cases the relief has been denied on the ground that the remedy at law was adequate. But in most of these there were other circumstances which rendered it inequitable to grant the relief, while, in many of the cases in which injunctions were granted on the ground of irreparable injury, it was plain enough that the injury could have been readily repaired or fully compensated in money.

"It seems to us that the jurisdiction of equity in such cases may be placed upon broader grounds, namely, that where the power of eminent domain has been delegated to public officers, or others who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation. *The remedy in equity protects both the owner and those acting under the authority, and is more speedy and efficacious in its operation than the ordinary legal remedies.*"

See also to the same effect:

Wilcox v. *Consolidated Gas Co.*, 212 U. S., 19.

Vicksburg Waterworks Co. v. *Vicksburg*, 185 U. S., 65.

Ex parte Young, 209 U. S., 193.

Home Tel. & Tel. Co. v. *Los Angeles*, 227 U. S., 278.

Old Colony Trust Co. v. *Omaha*, 230 U. S., 100.

Denver & Rio Grande v. *Arizona & Colorado R. R.*, 233 U. S., 601.

Grand Trunk Western Ry. Co. v. *City of South Bend*, 227 U. S., 544.

Louisville v. *Cumberland Telephone Co.*, 224 U. S., 649.

Northwestern Laundry Co. v. *Des Moines*, 239 U. S., 486.

Philadelphia Co. v. *Stimson*, 223 U. S., 605.

Even though the Ohio law afforded statutory or common law remedies, this would not deprive the plaintiff of his right to sue in equity in the Federal Courts.

Smyth v. *Ames*, 169 U. S., 466, 516.

McConihay v. *Wright*, 121 U. S., 201.

Lawrence v. *Nelson*, 143 U. S., 215, 223, 224.

Simon v. *Southern Ry. Co.*, 236 U. S. 115, 122, 123.

Harrison v. *St. L. & San Francisco R. R. Co.*, 232 U. S., 318, 328.

But is is well established in Ohio that where property is being taken without compensation an injunction should be granted to restrain the taking.

Callen v. *Electric Light Co.*, 66 Ohio St., 166.

Schaaf v. *Railroad Co.*, 66 Ohio St., 215.

Hamilton G. & C. Traction Co. v. *Hamilton & L. Elec. Transit Co.*, 69 Ohio St., 402.

Zimmerman v. *Canfield*, 42 Ohio St., 463.

These cases make the right to resort to equity unquestionable.

PART FIFTH.

The property of the Power Company devoted to a public use is not subject to the doctrine of laches, nor can that principle be invoked as a shield for the confiscation of defendant.

The Court below finds that the chief industry of the Power Company has been the making of claims against the city (Record, p.), and *also finds that the Power Company has been guilty of laches.* These statements are contradictory. Which is true? A short review of the facts will furnish the answer.

In 1908 the State devoted the water of the Cuyahoga River to a public use by the filing of articles of incorporation of The Power Company, which are proof of the facts stated therein in every office and court in this country.

In 1908 the Power Company filed various condemnation suits in the Probate Court of Summit County and those suits were *lis pendens* and were notice to the City of Akron from that date to the present time (G. C. 11,300). On August 26, 1912, defendant passed its ordinance of appropriation of the very property granted by the State to the Power Company, but the ordinance did not take effect until Sept. 10. On Sept. 3rd, 1912, Akron had notice that the amendment to the Constitution had been adopted repealing its statutory authority and that the repeal would become effective November 15, 1912. *Akron had notice of this vote seven days before its ordinance took legal effect,* and it then knew it could never carry out the grandiose scheme. The City was also at this time without funds to continue the construction of any plant, and

plaintiff had the right to assume that it would not so continue. In December, 1912, appellee purchased certain lands within the express terms of plaintiff's second grant and located in Portage County. The Power Company had neither the right nor the duty to prevent these purchases and therefore negotiated for the right to regulate the natural flow of the river and on March 29, 1913, *offered to buy* from the city the water rights appurtenant to these lands. The offer was considered by council and refused.

On April 8th, 1913, appellee, knowing that its statutory authority had been repealed, advertised for bids for the erection of a dam. On April 10th, 1913, The Power Company served notice of its prior and exclusive rights (Record, p. 19). The facts therefore are that defendant, without any valid description whatever, undertook as an upper proprietor, to appropriate waters on August 26, 1912, which had been appropriated four years before by The Power Company, pursuant to a grant of the State of a lower location for a public use. As the ordinance of Akron and the Constitution of Ohio provide for appropriation and not confiscation the Power Company had the right to expect, either, that the City Solicitor would comply with the ordinance, and The Power Company could then make the defenses it now makes here or that the City would abandon the enterprise entirely. The Power Company waited about seven months, expecting and believing that the City Solicitor would obey the plain mandate of the ordinance. The Power Company had not waived its claims in any way. It had not offered *to sell* anything whatever to the City, but on the contrary, had offered *to buy* from the city and in that offer to buy it asserted at length

and detail its corporate rights. (See offer of March 29, 1913, and maps and surveys accompanying the same (Bill, Par. 29).

So the sole question is,—Was the Power Company guilty of laches because it gave defendant the interval between September 10, 1912 and April 10, 1913—seven months,—to comply with its constitutional obligation to pay for all property in the river before it made a physical entry, and to prove its statutory right to appropriate?

Was the Power Company in fact sleeping on its rights so that the Court below could justly claim it had lost its charter and franchises? Or was apepllee, claiming to act under a delegated power of eminent domain, evading its duty under the Constitution? The Court below cited N. Y. City *v.* Pine, 185 U. S., 93, which has no application whatever, for the fundamental reason that Pine had a right to sell his property and The Power Co. could not sell the grant from the State, essential to carry out its public purposes except by statutory proceedings of the most formal character. But this Court found that Pine, even as an owner of private property, and after having led the City to believe he would sell, was nevertheless entitled to compensation, and made orders to insure that Pine would get his money. The contrast between the treatment of Pine by this Court, and the appellant by the Court below in this case is most marked.

The State Courts hold there is no *laches* under the State Constitution, if there has been no acquiescence, and the right to compensation for private property is not barred by the lapse of less than twenty-one years. (Railroad *v.* O'Hara, 48 O. S., 343, 28 N. E., 175.)

The rights involved in this case consist of property devoted to a public use—property which is, indeed, impressed with a trust in favor of the public. It is well settled that a railroad cannot be deprived of its right of way even by an actual adverse occupancy of a prescriptive period.

> *Northern Pacific Ry* v. *Townsend*, 190 U. S., 267.
> *Same* v. *Ely*, 197 U. S., 1.

And the principles of these cases make it impossible to hold that the right to preserve the right of way of the Power Company to the use for which the State granted it, can become barred by a short delay. The doctrine of laches has no more application here than the Statutes of Limitation have to an adverse possession of a railroad right of way.

Another vital difference between the *Pine case* and the case at bar is that it appeared in that case that the plaintiffs in the suit had been trying to agree upon the amount of compensation to be paid by the City. The plaintiffs in that case, as this Court pointed out, "were seeking compensation for the injuries they would sustain and were *not insisting upon their alleged right to an abandonment of the work*" (p. 97). And in an apparent endeavor to bring the case at bar into line with that case it was stated in the opinion below that:

> "various futile attempts to compromise with the City of Akron were made" (Rec., p. 50).

But this is a very inaccurate statement of the averments of the bill. What the bill states is, that, after the passage of the City's resolution and ordinance, the Power Company

> "well knowing that the defendant could not

> possibly consume for any legitimate public use more than a small percentage of the amount of water which, by said ordinance, it proposed to take, negotiated with the defendant for such a harmonizing of the plans of the defendant and said Power Company as would secure to each party a reasonable use of the waters of said river, and said Power Company, as a further proposition of compromise, offered to pay to the defendant the sum of one thousand dollars per mile for the right to equalize the flow of said river above and to the point at which the defendant proposed to erect its dam" (Bill, Par. 28th).

This is the direct opposite of a "futile attempt to compromise" in the sense that the Power Company was *bargaining for the payment of compensation to it.* On the contrary, it was offering *to purchase riparian rights appurtenant to private lands then owned by the city* in order to be enabled to go ahead with its development without litigation, and when the City rejected its proposals the Power Company promptly notified the City that its proposed diversion of the waters of the river

> "will necessarily invade the *exclusive rights* which this company now has in and to the waters of the Cuyahoga River, and that *this corporation stand on its rights*" (Bill, Par. 29th).

This notice was given April 10, 1912, before the contracts for the erection of the City's dam had been let.

Thus in this case the Power Company did precisely what Pine refrained from doing, viz.: it asserted its rights in good time and stated that it intended to stand upon them. The opinion of this Court in the *Pine case* leaves no doubt as to

the effect of this action of the Power Company. It was there said (p. 97):

> "It is one thing to state a right and proffer a waiver thereof for compensation and an entirely different thing to state the same right and demand that it should be respected. *In the latter case the defendant acts at his peril.* In the former he may well assume that payment of a just compensation will be accepted in lieu of the right. In the latter the plaintiff holds out the single question of the validity and extent of the right; in the former he presents the right as the foundation of a claim of compensation, and his threat to enforce the right if compensation is not made is simply a club to compel payment of the sum he deems the measure of his damages. * * *
>
> "If the plaintiffs had intended to insist upon the strict legal rights (which for the purposes of this case we assume they possessed), they should have commenced at once, and before the City had gone to expense, to restrain any work by it. It would be inequitable to permit them to *carry on negotiations with a view to compensation* until the City had gone to such great expense, and then, failing to agree upon the compensation, fall back upon the alleged absolute right to prevent the work. If they had intended to rest upon such right and had commenced proceedings at once, the City might have concluded to abandon the proposed undertaking and seek its water supplies in some other direction."

In addition to all this, within two months after the notice had been given—still before any substantial headway had been made—the Power Company brought its suit for an injunction (Bill, Par. 34).

Laches is not a mere matter of time, but a question of the inequity of permitting a claim to be

enforced—an inequity founded upon some change in the condition or relation of the property or the parties. It is, indeed, closely akin to estoppel, for it is never applied except where the inaction of the plaintiff has *misled* the defendant to his prejudice or created or permitted a change of condition.

Galliher v. *Cadwell*, 145 U. S., 368.
Old Colony Trust Co. v. *Dubuque L. & T. Co.*, 89 Fed., 794, 807.
Hubbard v. *Manhattan Trust Co.*, 87 Fed., 51, 59.
O'Brien v. *Wheelock*, 184 U. S., 450, 493.

In the case last cited the language of this Court was:

> "It is not a mere matter of lapse of time, but a change of situation during neglectful repose, rendering it inequitable to afford relief."

In *Northern Pacific Ry.* v. *Boyd*, 228 U. S., 482, 508-509, it was said:

> "Lastly, it is said that Boyd was estopped from attacking, in 1906, a reorganization completed in 1896, and, ordinarily, such a lapse of time would prevent any creditor from asserting a claim like that here made. For along with the policy to encourage reorganizations, goes that of requiring prompt action by those who claim that their rights have been injuriously affected. The fact that improvements are put upon the property—that the stock and bonds of the new company almost immediately became the subject of transactions with third persons—call for special application of the rule of diligence. *But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations.* For what might be inexcusable de-

> lay in one case would not be inconsistent with diligence in another, and UNLESS THE NON ACTION OF THE COMPLAINANT OPERATED TO DAMAGE THE DEFENDANT OR TO INDUCE IT TO CHANGE ITS POSITION, THERE IS NO NECESSARY ESTOPPEL ARISING FROM THE MERE LAPSE OF TIME. *Townsend* v. *Vanderworker*, 160 U. S., 171, 186.
>
> "In this case the defendants and their stockholders have not been injured by Boyd's failure to sue."

And the real doctrine of the *Pine case* is that by delaying his suit and negotiating for compensation Pine *misled* the City into believing that he waived his strict legal rights and was content to take compensation.

The situation here is precisely the reverse. This is not a case in which the parties in interest voluntarily stood idle while the City went ahead. The bald statement that this particular suit was not instituted for about two years after the City started work nor until "within six days" of the time the work was completed misrepresents the situation. *The Power Company had been insisting on its strict legal rights from the beginning and that those rights were not for sale. It had given formal notice that those rights were exclusive and of its intent to stand upon them at the very inception of the City's undertaking.* Moreover, it had actually commenced a suit to enjoin the City from proceeding.

The Court below said the bondholders represented by the present plaintiff must have known of that suit. They indeed did, and they were within their rights in relying upon it until the City boldly announced that it would commence actual diversion of the waters of the river before the appeal in that case could be heard in this Court.

Where do defendants get authority for the assumption that the victim of a confiscation may pursue his property by one action only requiring years for final decision, while in the meantime the property openly and notoriously is being completely destroyed by one who would not and could not pay?

We commend to the notice of appellee the rule of action adopted by the Pennsylvania R. R. Co. in dealing with the Western Union Tel. Co. when the latter persisted in trespassing on its right of way. (W. U. Tel. Co. *v.* Penna. R. R. Co., 195 U. S., 495.)

Another case applicable here is *Denver & Rio Grande R. R. Co.* v. *Arizona & Colorado R. R. Co.*, 233 U. S., 601, 603, in which this Court said:

> "Next it is said that the plaintiff has been guilty of laches. But it is found that the defendant with full knowledge threatened and intended to take and occupy and has crossed and recrossed the plaintiff's location at many points and different grades, with circumstances not necessary to be detailed, and thus has made it impracticable for the plaintiff to proceed. It is found also that in the location and acquisition of its line the plaintiff proceeded with due diligence and in good faith, and that it had evpended more than one hundred thousand dollars in the location and securing rights of way before the beginning of this suit. THE DEFENDANT HAS GONE AHEAD SINCE THE SUIT WAS BEGUN, BUT OF COURSE HAS ACQUIRED NO NEW RIGHTS BY DOING SO. The objections to equitable jurisdiction do not need separate discussion. The line is found to be the best line between fhe points and the plaintiff is entitled to it. It neither is to be forced into a compulsory sale nor to be remitted to legal or statutory remedies, that rightly are thought to be inadequate by the local Court."

Another pertinent case is *Galway* v. *Metropolitan El. Ry. Co.*, 128 N. Y., 132, which, as stated by the Court, was "one of the usual actions in equity to restrain the defendants from further maintaining and operating an elevated street railroad." The road was commenced and completed between January and July, 1878. The action was not brought until 1889, and during all the intervening time defendant had continued to maintain and operate the road, but without taking any proceedings to acquire the easements of abutting owners or their consent to its construction. It was earnestly insisted that the plaintiff had lost his rights by reason of his inaction—the doctrines of laches, acquiescence, and equitable estoppel, each being invoked and insisted upon. In answer to those contentions the Court used language which is very appropriate here in view of the apparent disposition of the Court below to shrink from a full enforcement of the Constitution on account of the hardship which might result to the defendant. With respect to the claim that the inaction of the plaintiff in that case barred his right to relief the Court said (p. 153):

> "This claim comes with little grace from parties who have for a much longer period neglected to take proceedings to acquire the real ownership of the property required by them in the prosecution of their enterprise."

And at page 156:

> "The plaintiff had reason to suppose the defendants would discontinue their trespasses, or, if they were continued, they would resort to legal means to justify them. They had no reason to believe that the defendants deliberately intended to prosecute their enter-

prise, altogether regardless of the legal rights of others, and were justified in delaying a reasonable time in expectation that the defendants would reasonably do justice to those whose property they were appropriating to their own use."

With respect to the claim that the acquiescence of the plaintiff constituted a defense, the Court said (p. 152):

> "It is obvious that such conduct has never led the defendants into a line of action which they would not otherwise have pursued, or encouraged them to expend money or make improvements by reason of their reliance upon the alleged inaction or acquiescence of the plaintiff. They inaugurated their enterprise in the face of persistent opposition by the plaintiff and other abutting owners, and carried it to completion while earnest efforts were being made to prevent them."

Finally—and this is exceedingly *apropos* when it is remembered that whatever hardship the appellee may suffer is but the result of its own wilful refusal to ascertain in advance whether it might lawfully condemn the property of the Power Company—the Court said (p. 150):

> "A party who voluntarily prosecutes a public enterprise for his own benefit, without regard to the legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct; but this is the result of his own volition and the injury which necessarily follows such action cannot lawfully be imposed upon the parties injured without disregarding the constitutional provisions intended for their protection."

Is the public trust imposed upon the officers

of the Power Company by the State of Ohio different from that of the officers of the United States in the care of the public domain?

This Court has just said in Utah Power & Light Co. *v.* U. S., 243 U. S., 389:

> "In their answers some of the defendants assert that when the forest reservations were created an understanding and agreement was had between the defendants, or their predecessors, and some unmentioned officers or agents of the United States, to the effect that the reservations would not be an obstacle to the construction or operation of the works in question; that all rights essential thereto would be allowed and granted under the Act of 1905; that, consistently with this understanding and agreement, and relying thereon, the defendants, or their predecessors, completed the works and proceeded with the generation and distribution of electric energy, and that, in consequence, the United States is estopped to question the right of the defendants to maintain and operate the works. Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. Lee *v.* Munroe, 7 Cranch, 366, 3 L. ed., 373; Filor *v.* United States, 9 Wall., 45, 49, 19 L. ed., 549, 551; Hart *v.* United States, 95 U. S., 316, 24 L. ed., 479; Pine River Logging Co. *v.* United States, 186 U. S., 279, 291, 46 L. ed., 1164, 1170, 22 Sup. Ct. Rep., 920.
>
> "As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the government, with knowledge of what the defendants were doing, not only did not object thereto, but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail.

> As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest. And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it, as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it."

The United States hold public lands for public use.

The State of Ohio has appropriated lands on the Cuyahoga River to a public use acting through the Power Company. The trust in each case differs in scope, but not in principle.

CONCLUSION.

Defendants have confiscated the right of way of appellee over its continued protest and with full knowledge that they had no money with which to pay and with no intention of paying.

We have above cited some general precedents concerning the right to injunction, but now desire to bring emphatically to the notice of the Court the doctrine of the State Court in construing its own constitution and statutes in a situation almost identical to this, the point of difference being that the property taken in the case cited, was private property, and the owner, Lewton, was less able to take over and administer the road to secure his debt than the plaintiff is to take over the Akron Water Plant, and administer

it for the benefit of the public and as part of its own plant, and, *also* furnish an abundant supply of water and produce over 50,000,000 K. W. hrs. of electric current now wasted by the City under its fractional development.

In Dayton, Xenia and Belpre R. R. Co. *v.* Lewton, 20 O. S., 401, the facts were that Lewton had sold his land to the railroad company, which company was later merged with the Little Miami & Columbus & Xenia R. R. Companies. The Dayton Railroad Company did not pay for the land and Lewton brought an action to recover the property. The discussion of the Court is authoritative of the doctrine of Ohio and binding upon the Federal courts in this case:

> "The rights of the public must not be ignored; and it is the right of the public that this highway be maintained. It was by and through the exercise of its power of eminent domain that it was established. And we take it, that the right of the public to maintain the highway is paramount to the right of the defendant-in-error to destroy it. To sell the section of the right of way over the lands of the defendant-in-error, and separate its use from the line of the road, would destroy the highway. Hence, to have decreed a sale of this fraction of the road, or right of way, would have been erroneous. The public having delegated to the Dayton, Xenia & Belpre Railroad Company the power to exercise the right of eminent domain in the establishment of this highway, the company had power to obtain the right of way for its road in two modes—by condemnation and the prepayment of compensation under the right of eminent domain, or by contract with the owners of the land, upon such terms as might be agreed upon. In Lewton's case the latter mode was resorted to, and, by the terms of the contract, a right to enter upon the land and construct the road before the payment

of compensation was secured; and yet that compensation was secured to Lewton by an equitable lien upon the easement thus obtained by the company. And justice requires that this security shall be applied to the satisfaction of Lewton's claim. Can it be done? The difficulty is apparent, rather than real.

"The public has and can have no right which springs from an act of injustice to the defendant-in-error. Its only right is to preserve the continuity of the road, of the line of public travel and transportation. *And this right is as well subserved, if the ownership and management of the highway be in the hands of one party as another.* Hence the public has no interest impaired by a sale of the whole line. We have seen that the Little Miami, and Columbus & Xenia Railroad Companies and Rockwell stand in the shoes of the Dayton, Xenia & Belpre Railroad Company. And what shall be said of the rights of the latter? Has it a right to retain the property of the defendant-in-error without paying for it? Having obtain the possession of this property from the defendant-in-error, under the promise to pay for it, the Dayton, Xenia & Belpre Railroad Company may not so blend and mix it with other property of its own, as to constitute a great and indivisible highway, and then be permitted to say in equity to the defendant-in-error, 'This property, upon which you had and have a specific lien, had become, by my act, a part of a highway which the public has an interest in maintaining, and because the withdrawal of your part from the common use would defeat the public right, therefore, you may not enforce your lien.' On the other hand, because a part may not be sold on account of the paramount right of the public to keep the highway intact, a necessity arises, in order that justice may be done to the defendant-in-error, to decree the sale of the whole line of the road to satisfy his lien. And this is the only mode in which the rights

and interests of other parties, either as owners or lienholders upon the road, can be protected, and their property or security saved from absolute destruction."

Appellee deliberately entered upon appellants' property and has stated for years that it would not pay anything therefor. At a nominal expense it could have tested appellee's rights and their value by condemnation suits immediately after it passed its ordinance, August 26th, 1912. It was the duty of the City Solicitor to have brought that proceeding immediately.

Before the construction of the dam was begun suit was filed and has been continuously pending. On July 24, 1915, the appellant applied for interlocutory injunction before Honorable Arthur J. Tuttle, at which hearing the following proceedings occurred. as reported by the court stenographer:

"The Court: Well, now, don't you think that, whenever a Judge issues a temporary injunction, and particularly under this statute which provides that a temporary injunction even can only be issue by three, that when the individual District Judge intervenes and acts by issuing the stay order for the ten days, or a brief period until the other can be heard, that there ought to be actual irreparable injury to the complainant, or the moving party, before you can do that?

"Mr. Walter: Yes, and I would include within that the fact that irreparable injury consists, in part, of the deprivation of a legal right which cannot be possibly measured in damages and subsequently paid for. And if the matter were wholly in the discretion of the court, or if the legal rights were doubtful, there should be justification for that position. But there can be no escape, in this case, that there has been a viozlation of the Constitution of Ohio; and,

without due process of law, the City of Akron has deliberately chosen to go ahead with this enterprise and not spend the fifty dollars that it would cost them to bring the Cuyahoga River Power Company into court and condemn their rights. Now, there will not be any dispute that the Constitution of Ohio says they must pay first and take afterwards. And if they had chosen to obey the constitution, they would not have any water famine, and they would not be up against this question at all; it would have been met and decided long ago, in a court of their own forum, they could have brought us into the State courts down there at Akron, and had a jury assess our rights as to what they were worth and what constitutes irreparable damage to us. But I cannot make it any too strong that there is no escape from the proposition that this a palpable violation of the Constitution of Ohio and a taking without due process of law, plainly and unequivocally, to take a drop of that water without paying compensation. * * *

Mr. Walter: Well, your Honor, if the water starts down, it is a hard proposition to say that they are going to get it back. And I wish this contingent from Akron had brought up the Mayor to see what he would say for the City of Akron on the question of letting it down before we know they have got a right to let it down. If the newspapers quote him correctly, if there is any chance in the world of this company succeeding on the preliminary injunction, he would rather have it stopped now than go ahead and take the water.

"The Court: Well, perhaps it would be well to hear from Mr. Taylor as to whether, when it is once turned on, it can be easily turned off, or stopped.

"Mr. Taylor: Of course it can, your Honor.

"The Court: Let me find out about that.

"Mr. Taylor: Oh, of course. There is no

question about it—just turn a lever and the water goes off, that's all; stop our pumps and there won't be any more pumped. You see, we pump the water, your Honor.

"The Court: So that if I didn't issue the stay order, and, on the hearing of this matter, when it was decided by the Court, when properly constituted, that you ought to be restrained, you could easily stop using it, could you?

"Mr. Taylor: Just turn a wheel, that's all—turn one wheel over and stop our water. That is a very simple matter.

"The Court: And are you certain about the proposition that you are not going ahead now to change the water courses and conduits—that that has all been done, the channels for the water and connections are all in?

"Mr. Taylor: Yes, sir; without fear of contradiction, I state that to be a fact.

"The Court: Well, let me, then, on the record ask Mr. Taylor, the City Attorney, if you are seeking any advantage of that kind by using this water, if you hope to acquire some legal rights that you wouldn't have today?

"Mr. Taylor: Absolutely not, sir.

"The Court: You waive any such contention as that because during the hearing of this motion and my failure to restrain you, you should use some of that water for your needs and necessities, you wouldn't claim that thereby you had gained any peculiar or added rights?

"Mr. Taylor: Just a moment.

"Thereupon Mr. Taylor consulted with Mr. Hogsett.

"Mr. Hogsett: No, your Honor, if the Court should decide this temporary order now and we should begin to use this water Monday, say, we wouldn't claim that that fact would deprive them of any right, so far as we are concerned. Where we have our rights we have them now.

"The Court: No different right than if

they restrained you and during that time you didn't use any of it?

"Mr. Hogsett: I can see no legal ground upon which we could claim any legal right—any other or added right, and if that is the turning point in the case, I would be willing to say to the Court that we would not undertake to take advantage of that.

"The Court: And let me ask you further—and I address Mr. Taylor in these remarks, because he is the City Attorney, a city official, and, so far, there has been no appearance entered here, but I am glad to have your statement on the subject, too, as well, Mr. Taylor, if I do not issue the restraining order, do I understand you will continue to use from the canal that you have been using from in the past, and that you will only use this water in case that fails to furnish you enough; and that you will only use it to supply a deficiency and that you will continue until we can have a hearing?

"Mr. Taylor: Yes, that's right."

The above shows that the defendants were warned that they could not thereafter plead public necessity if they abandoned their old supply and began the confiscation of the Power Company's property and the whole alleged "water famine" consisted of the fact that they had neglected to keep the Todd Pump in repair which had been pumping the former supply. So the real practical question before the Court was, should the appellee have been ordered to repair the pump, or permitted to begin the confiscation of the Power Company's plant.

The charter of the Power Company is before this Court and by the laws of Ohio and of the United States no further proof of its contents is necessary. Nor can there be any doubt as to its meaning.

The State of Ohio acting through its agent, the City of Akron, has impaired the obligation of the charter of the Power Company, and deprived it of property without compensation and for a private use.

The judgment should be reversed, with directions to grant the injunction prayed for in the bill, and all further possible relief.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1917.

No. 105.

JOHN H. SPEARS as Trustee,

Appellant,

vs.

THE CITY OF AKRON,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF OF APPELLEE.

SCOTT KENFIELD,
THOS. H. HOGSETT,
Attorneys for the Appellee.

SHELDON H. TOLLES,
JOHN E. MORLEY,
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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This cause comes before this Court on an appeal by John H. Sears as Trustee, plaintiff below, from a decree entered in the District Court of the United States for the Northern District of Ohio, dismissing the plaintiff's bill of complaint. A motion to dismiss (Rec., page 44) was sustained by the District Court and final decree entered upon the merits, directing a dismissal of the bill on the ground that it stated no cause for equitable relief. The plaintiff below sued as Trustee under a mortgage or deed of trust dated July 13th, 1915, executed by The Cuyahoga River Power Company (hereinafter for convenience re-

ferred to as the Power Company), to secure an issue of One Hundred and Fifty Thousand Dollars ($150,000) par value of bonds issued by the Power Company and conveying in trust all property and franchise rights of the Power Company, a copy of the trust deed, marked Exhibit "A," being attached to the bill (Rec., page 24). It appears that the bonds, $135,000 par value of which are alleged to be outstanding, were issued in payment of indebtedness incurred in April, 1909. The Power Company, an Ohio corporation, was incorporated in May, 1908, as a hydro-electric company by the filing of articles of incorporation under the general laws of the State, Section 10128 of the Ohio General Code, defining the purposes and powers of such corporations as follows:

> "Section 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes, or conduits, or by means of wires, cables, or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such

> tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid."

The original articles of incorporation of the Company filed on May 29th, 1908, stated the purpose of the corporation in general terms conforming to the language of the above section and limited the operations of the Company to the Big Cuyahoga River in Summit County, Ohio, between its junction with the Little Cuyahoga and the easterly line of Summit County.

In February, 1912, the articles of incorporation of the Power Company were amended so as to very much enlarge the scope of the Company and specified a territory for its operation which covered the rivers, streams and watersheds of a large portion of northeastern Ohio.

It is claimed by appellant that the filing of articles of incorporation and the organization of the Power Company under this general law constituted a grant from the State of Ohio to the Company of an *exclusive right* to construct dams, reservoirs, etc., upon and develop the water power of the rivers and streams embraced within the territory named in its amended articles and that, by the private corporate action of the Company in the adoption of plans for the development of its project and the making of maps and surveys incident thereto as detailed in the bill, it had acquired an equitable right to the various parcels of land and interests therein designated in the plans and surveys adopted as aforesaid and alleged to be necessary in carrying out said project.

This alleged contract with the state appellant claims has been impaired and its alleged equitable rights in the lands and water rights involved in the project are claimed to be invaded by the City's action in developing a water supply for the use of the inhabitants of the City, by the construction of the dam in the Cuyahoga River and the threatened diversion of water described in the bill.

Various statutes of the State and ordinances of the City Council purporting to act under authority thereof are set forth in the bill and, in addition to the claim that these state laws and the action of the City as an agency of the State in pursuance thereof constitute an impairment of the Power Company's so called grant from the State and therefore in violation of the constitutional limitation protecting such contracts, it is further claimed that the action of the City, purporting to be under color of legislative authority, has in fact been irregular and not in conformity with legal requirements and is therefore, for this additional reason, unlawful.

The bill prays for an injunction enjoining the City from continuing the construction of its dam or reservoir and from taking or diverting any part of the waters of the Cuyahoga River or its tributaries in any manner to interfere with the prosecution of the Power Company's project, as well as from interfering in any way with the normal and natural flow of the river.

The court below held that the mere incorporation of the Company under the general laws of the State did not constitute a grant of any exclusive rights, nor did the adoption by private corporate action of plans and surveys vest any equitable right or interest in the Power Company to the lands and waters involved therein, so

that the appropriation thereof by the State or any agency of the State would constitute any invasion of the Power Company's property rights, and furthermore that, under the facts alleged in the bill, plaintiff below was guilty of such laches as would in any event preclude it from obtaining the equitable relief sought.

DISCUSSION OF THE FACTS.

Inasmuch as the case depends entirely upon the appellant's right to the equitable relief sought upon the allegations of the bill of complaint, which, so far as they are well pleaded, must be held to be admitted in considering the motion to dismiss, it is important to consider carefully the facts as disclosed by the bill.

The original articles of incorporation of the Power Company which were filed in May, 1908, announced the purposes of the corporation in substance as the construction and maintenance of dams in the Cuyahoga River for the purpose of raising and maintaining a head of water to be conveyed to a power plant for the generation of electricity, the erection and maintenance of transmission lines and the production and sale of electricity for light, heat and power purposes under municipal franchises and otherwise, and located the improvement of the Company as beginning at the junction of the Big and Little Cuyahoga Rivers, below the City of Akron in Summit County and extending along the River to the County line between Summit and Portage Counties. It should be noted that this territory as designated in the original articles is considerably below the point where improvements of the City of Akron are located and, except in so far as any

diversion of water might affect any volume of flow in the lower stretches of the River, the improvements constructed by the City in the upper River would not in any way interfere with such corporate purposes.

The bill alleges that the Power Company thereupon caused surveys, maps and plans to be made of its proposed improvements and that, on or about June 3d, 1908, by resolution of its Board of Directors it adopted a plan for its contemplated developments known as "Plan of Roberts-Abbott Company, Consulting Engineers" (Rec., page 4). The Plan so adopted provided for the construction of a dam in the Big Cuyahoga River at a point in the Village of Cuyahoga Falls and the utilization of the head of water thereby obtained by means of a suitable canal or conduit conducting the water from the dam along the left bank of the river to a proposed hydro-electric plant to be constructed at a point on the left bank a short distance westerly of the west corporation line of Cuyahoga Falls, thus using the water power to be obtained from the fall of water of some 200 feet between the crest of the proposed dam and the hydro-electric plant.

There is no averment in the bill that the acts of the appellee, which are complained of, would interfere with or materially impair the original project of the Power Company as specified in this Plan.

It is averred that this Plan and the reports and surveys of the engineers, adopted by the Power Company, contained specific descriptions of the various parcels of land necessary to be acquired or utilized in the carrying out of the Plan and in the construction of the improvements involved therein and that these specific descriptions were adopted by the Board of Directors of the

Power Company on June 4th, 1908, as descriptions of parcels of land which the Company proposed to acquire, and the claim is made that the Company thereby appropriated said parcels to its use (Rec., page 4). What these parcels were however is not stated in the bill, nor does it appear that any of them have been taken by the City of Akron in connection with its improvements or in any wise affected thereby.

Having passed the resolution adopting these descriptions, the bill avers that on or about June 5th, 1908, the Power Company instituted a suit in Probate Court of Summit County, Ohio, to condemn or appropriate the parcels of land in question. This suit it is stated was contested by various property owners upon various grounds (Rec., page 5). There is no averment however that any land has been in fact acquired, but on the contrary it would appear that this appropriation proceeding has come to nothing as the bill avers that the Supreme Court of Ohio has held the offers to purchase, which under Ohio law are an essential condition precedent to bringing an appropriation suit, were invalid because the owners were not given sufficient time to consider them (Rec., page 5).

After the adoption of the so-called "Roberts-Abbott Plan" and the institution of the above mentioned appropriation suit based upon it, the Power Company, the bill alleges, made further examination and surveys of the watershed of the Cuyahoga River and on April 23d, 1909, by corporate resolution amended the Roberts-Abbott Plan by the adoption of a supplemental plan known as the "Van Schon Plan." This plan embodied a much more extensive scheme of water power development as well as the erection of a hydro-electric plant at an en-

tirely different location, the general outline of the proposed scheme being set forth in paragraph Tenth of the bill (Rec., page 5). This Plan contemplated the construction of a large reservoir at the upper end of the Cuyahoga River in Geauga County, the diversion of the river above Cuyahoga Falls through artificial channels, making use of various lakes, and the construction of a power plant at Vaughn on the lower Cuyahoga River in Cuyahoga County. It should be noted that this Plan provided for a scheme of water power development far beyond the limits specified in the original articles of incorporation and was entirely beyond the corporate powers of the Company which then existed.

Nothing further appears to have been done with respect to the carrying out of this plan for several years. The appropriation suit instituted by the Company in June, 1908, for the condemnation of various parcels was based upon the original Roberts-Abbott Plan (paragraph Eleventh of the bill, Rec., page 5), which, according to the bill, had been abandoned so that it would seem that the circumstance of the commencement of this suit and its pendency ought to have no material bearing on the case. No land was ever acquired by the Power Company either by appropriation or otherwise in connection with the original purposes of the corporation, nor were any works or improvements of any kind commenced or undertaken.

In this situation it appears that as early as 1911 and at a time when the Power Company had done nothing toward carrying forward its project, other than the institution in 1908 of an appropriation suit to acquire lands under a plan of water power development soon thereafter abandoned, the City of Akron became engaged in a

project for betterment of its water supply and its intentions in this regard, it appears from the complaint, were disclosed by the passage of a bill by the Ohio General Assembly on May 7th, 1911. By this bill (House Bill No. 357, Volume 102, Ohio Laws, page 175) the legislature purported to grant to the City of Akron the right to divert and use, for the purpose of supplying water to the City and its inhabitants, the waters of the Cuyahoga River, conditioned however on such use not diminishing the supply necessary to maintain a proper flow in the Ohio canal, with the right to occupy lands of the State for the construction of reservoirs, dams and development of additional water storage. In June of that year an engineering plan was prepared by engineers for the City for the improvement of the City's water supply, involving the construction of a dam in the upper course of the River at a point in Franklin Township, Portage County, and the diversion of water at that point.

We think it can be assumed that the promoters of the Power Company had knowledge of the City's plans in regard to the new water supply and it was no doubt with this knowledge in mind and perhaps for the purpose of opposing such action on the part of the City that, in February, 1912, amended articles of incorporation were filed by the Power Company, enlarging its purposes and covering in a blanket way the territory from which the proposed water supply of the City was to be derived. The amended articles provided that the purposes of the Company should be the acquiring, erecting, building, maintaining and operating of a dam or a series of dams in the Cuyahoga River, Tuscarawas River, Mud Brook, Brandywine and Tinkers Creeks and the tributaries of each of them, being situated in Medina, Summit, Portage,

Stark, Geauga, Tuscarawas and adjoining Counties in the State of Ohio, the eastern terminus of the proposed improvements being specified as at or near the Village of Burton Station in Geauga County, its western terminus at or near the confluence of Tinkers Creek and the Cuyahoga River in Cuyahoga County, and its southern terminus at or near Canal Dover in Tuscarawas County (Rec., page 6). It may be noted that this scheme covers the rivers, streams and watersheds of a large portion of northeastern Ohio.

Having thus amended its articles, the Power Company in May, 1912, by corporate resolution ratified the "Von Schon Plan," previously adopted in April, 1909, and it is alleged located and adopted specific surveys and descriptions of various parcels of land required in the execution of the Plan.

Although the bill avers in general terms that the Power Company since its incorporation has been actively and diligently engaged in the prosecution of its corporate business and in the acquisition of the property necessary therefor, the bill nevertheless does not show that anything was done in this regard prior to the time when the City commenced its water supply improvements, other than the adoption by private corporate action of the plans and surveys above mentioned and the institution in June, 1908, of the appropriation suit mentioned in paragraph Eleventh of the bill and which appropriation suit, as above remarked, was based upon the original "Roberts-Abbott Plan" which has since been abandoned.

It is alleged that 700 owners of property are affected by the proposed development under the "Von Schon Plan," of which the fee to the lands is required from 153

owners or 16% of the whole, diversion rights from 96 owners or 14% of the whole, and rights to equalize the flow of the river from 480 owners or approximately 70% of the whole (Rec., page 9). Prior to the City's action, however, it does not appear that any lands or legal title to any water rights or other property interests had in fact been acquired.

The allegations of the bill with respect to the acquisition of property involved in the proposed development are contained in paragraph Nineteenth of the bill (Rec., pages 10 and 11) and are in substance as follows:

1. The pendency of appropriation suits, the allegation being that "at all times since June 5th, 1908, there have been and now are pending in the courts of Ohio one or more suits by said Power Company as plaintiff for the appropriation by said Power Company of one or more parcels of land in, along, upon and abutting on the Cuyahoga River, and that the summonses in said suits were all duly served prior to May 27th, 1912." There is no specification, however, as to what these suits are except as regards the original appropriation suit alleged to have been filed on June 5th, 1908, and the above broad allegation of the pendency of one or more suits can very well be held to apply to this one proceeding instituted in 1908. There is certainly no averment of the institution of any other appropriation suit. As previously stated, this original appropriation proceeding, filed against a number of owners and covering a number of parcels, was based upon the abandoned Roberts-Abbott Plan and appears to have come to nothing. So far as we know the only appropriation proceeding pending at the time of filing the bill was one for the condemnation of certain

property belonging to The Northern Ohio Traction & Light Company and that action has resulted finally adversely to the Power Company. *Cuyahoga River Power Co. vs. Northern Realty Co., et al.*, 244 U. S. 300.

2. The acquisition by purchase in June, 1915, of a parcel of land containing .22 acre located on the west bank of the Cuyahoga River in the Township of Cuyahoga Falls, known as the Keller parcel. It is important to note with respect to this parcel that the description carries the property only to the bank of the river at high water mark and we submit that the acquisition of this property carried with it no right to the bed of the stream or in the stream itself. The property also was acquired several years after the City of Akron had undertaken its water supply development and at the time when the improvement constructed by the City at the cost of several million dollars had been substantially completed.

3. Certain indefinite rights in the Boetler property so called in Franklin Township, Portage County, Ohio, said to be so much of the bed of the Cuyahoga River as lies within lands belonging to the Boetlers but without any specification as to the extent thereof or as to whether in fact the lands of said parties included any of said river bed. So far as this indefinite right is concerned there is no allegation as to when it was acquired or as to what, if anything, was paid for it. There is certainly nothing in the allegations of the bill with respect to this Boetler property upon which any title, either legal or equitable, to the waters of the Cuyahoga River can be predicated, or as against which the acts of the City of Akron in constituting its improvements further up the river must necessarily be deemed to be a trespass. It should also be

noticed that for aught that appears in the bill such rights, if any, as the Power Company may have in the Boetler property were acquired long after the City had gone forward with its improvements.

4. Options for the purchase of certain indefinitely described properties none of which however are described as being located on the Cuyahoga River or as having any riparian rights appurtenant thereto. The bill does not state when these options were obtained, so that for aught that appears they may have been acquired long after the City had commenced its operations. In appellant's brief, however, it is admitted that all these alleged property interests as well as the Keller property were acquired subsequent to the commencement of the first suit which the Power Company brought against the City, which was filed July 14, 1913. (appellant's brief, p. 56)

From the above it will be seen that the Power Company has purchased and holds the legal title to only one small piece of land located on the bank of the Cuyahoga River above high water mark and that too purchased several years after the City had commenced its operations and further that no land owned by the Power Company or held under contract or even covered by any appropriation proceeding now pending has been actually taken, occupied or in any way invaded by the City.

Coming now to the action of the City of Akron of which complaint is made. It appears that commencing with the passage by the Ohio Legislature on May 7th, 1911, of House Bill No. 357, above referred to, the City of Akron by various proceedings of its council and officials undertook some years ago the construction of certain public improvements for the increase and betterment of the City's water supply, involving the construc-

tion of a dam on the upper course of the Cuyahoga River at a point in Franklin Township, Portage County, and the use of water of the river at that point by the diversion and conveyance of a part thereof through a pipe line or conduit to the City. The bill sets forth certain action of the city council by resolution and ordinance commencing with the declaratory resolution adopted by the council on May 27th, 1912, (Rec., p. 11) and also sets forth certain sections of the Ohio Revised Statutes, under authority of which it is alleged that the council purported to act (Rec., page 13 and 14). The sections of the Ohio Statutes thus quoted manifestly give ample authority to the City to undertake the construction of the public improvements here in question and the appropriation of whatever private property might be required therefor, but it is claimed that the amendment to the Ohio Constitution, (Rec., p. 16) which took effect on November 15th, 1912, repealed the statutes theretofore in force and substituted certain procedure with respect to the construction or acquisition of public utilities by municipal corporations, which substituted procedure was not followed by the municipal authorities. Without here discussing the legal effect of the statutory and constitutional provisions of the State of Ohio involved in this portion of the bill of complaint, it is sufficient to say that the attack on the City's acts is not made by appellant in the capacity of a citizen or tax payer or in any way on behalf of the public, but merely on account of an alleged invasion of private property rights. From the allegations of the bill it appears that the City has gone forward and at the time of the filing of the bill had substantially completed its great public improvement at large expense and that no objection has been raised or

made to the prosecution of this great work by any citizen of the City or any tax payer for whose protection of course any restrictive provisions as to corporate procedure contained in the statutory or constitutional provisions quoted were intended.

It does not appear from the bill as to just when the City actually commenced the expenditure of public funds in the public improvement for its water works supply, but it does appear that as early as April, 1913, bids were received for the erection of the dam or reservoir on the upper waters of the Cuyahoga River (Rec., p. 19) and it may be assumed that the work of building the dam and reservoir must have been shortly thereafter started as the bill avers that the improvement has been so far completed as to enable the turning on of the water on August 1st, 1915, (Rec., p. 19) the bill having been filed a few days before that date. It is apparent therefore that the creditors of the Power Company, to secure whose claims the mortgage or deed of trust in question was executed, and as representing whom plaintiff below brought this action as Trustee, although they must have known of the City's intentions as early as 1911 and of the actual progress of the work since April, 1913, took no steps to prevent this alleged infringement of their rights until July, 1915, by which time millions of public money had been spent and the public improvements now complained of substantially completed.

It appears that the indebtedness represented by the Power Company's bonds was incurred in April, 1909, and that the Company had obligated itself to secure the indebtedness in question by the execution of a mortgage upon its property (Rec., pp. 20 and 24). The mortgage itself, under which the property of the Power Company

was conveyed to enable the Trustee to bring this action, was not given, as appears by the bill, until July, 1915, copy thereof attached to the bill of complaint disclosing that the instrument was acknowledged under date of July 15th, 1915, and presumably not delivered until on or subsequent to such date, so that at the date when such property rights, if any, as passed to the Trustee were acquired, the municipal action on the part of the City had long since been taken and the public structures built thereunder had been substantially completed.

It is of course apparent that any damage sustained by bondholders whom appellant represents are entirely monetary and if infringed can be fully compensated by the payment of money damages, which in no event could be in excess of the amount of the outstanding bonds and interest, the face amount of the bonds being $135,000.

As a ground of equitable relief, however, the bill avers that the City of Akron is without funds with which and is financially unable to pay the damages which will be caused to the Power Company by the acts complained of (Rec., p. 20). The court below (see opinion of Judge Clarke, now Mr. Justice Clarke, Rec., page 48) held that the allegations of the bill in this respect were mere conclusions of the pleader without any facts being stated to support them, and we submit that the allegation referred to in no sense amounts to a proper pleading of insolvency. It is not averred that the City is insolvent, nor are any facts set forth disclosing insolvency, the averment being merely that the City is without funds sufficient to pay and is financially unable to pay the damages which will be caused to the Power Company. There is no averment that the City will be unable to pay the sum of $135,000 and accrued interest, which would be the extent of the

bondholders' financial loss, and we do not believe that this Court will assume from such vague averments that the large and important City of Akron with a population of more than 100,000 inhabitants could not respond to a money judgment in that amount.

In like manner we submit that the averments of the bill that the City is fraudulently proposing to appropriate for use water from the river largely in excess of the actual requirements of the City should be disregarded. No facts are set out upon which fraud on the part of the City or its officials can be predicated, the bill containing merely the general averment that the action of the City has been taken

> "in bad faith and for the purpose of hindering the proposed development of the Power Company on said river and for the private benefit and advantage of certain individuals and private corporations adversely to the interest of the public and pursuant to a conspiracy plan and agreement between certain of the officials of the defendant and certain individuals and private corporations" (Rec., pages 18 and 19).

As we will later point out in the argument, we submit that general charges of fraud of this character are entirely insufficient as a ground for equitable relief.

Summing up the allegations of the bill of complaint, we think it is apparent from a careful analysis of the bill that the plaintiff's case rests entirely upon the claim that, by the filing of its articles of incorporation under the general laws of the State providing for the incorporation of hydro-electric companies, it acquired a grant from the State constituting a contract with the State for the exclusive right to use the waters and watersheds specified in its articles for the development of its water power project and that, upon the adoption by private

corporate action of certain plans, maps and surveys for the carrying out of such project, it became vested with an equitable right or title to all the lands and waters specified in such plans. Having acquired these rights, the claim is first that it has as it were secured a prior location on these waters which cannot be disturbed by any appropriation for public use and secondly, even if subject to appropriation, nevertheless its title is such that compensation must first be paid to it as a condition precedent to any use of the waters in question by the City and that under the constitutional guaranties of the federal constitution a court of equity must enjoin such use until the alleged property rights have been duly appropriated and compensation therefor paid.

ARGUMENT.

I. Effect of the Incorporation and Organization of the Power Company Under the General Laws of Ohio.

It is claimed by appellant that by the filing of articles of incorporation under the general laws of the State and the perfection of its organization thereunder, the Power Company acquired a charter which constituted a contract with the State, granting to the Power Company a right of way over and along the Cuyahoga River and a vested right or franchise to construct, maintain and operate a hydro-electric plant thereon, and furthermore that this grant was exclusive. In other words the claim is, as stated in appellant's brief, page 15,

> "The plain language of the charter, the whole intent and meaning of the grant, is that the Power Company should have the exclusive right to erect dams, locks, raceways, etc., in and upon the Cuyahoga River. * * *"

We submit that no such grant or contract arises from the fact of incorporation. In the first place it is clear that any grant of corporate powers in Ohio is subject to amendment or repeal and that no irrevocable privileges or immunities can be granted. The Ohio Constitution provides:

> "Article I. Section 2. No special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly."
>
> "Article XIII. Section 1. The General Assembly shall pass no special act conferring corporate powers."
>
> "Article XIII. Section 2. Corporations may be formed under general laws; but all such laws may from time to time be altered or repealed.* * *"

The Supreme Court of Ohio has said, *State ex rel. vs. City of Hamilton,* 47 O. S., 51, at page 74, referring to the above constitutional provisions:

> "The constitutional provisions entered into the general law, and operated as to all corporations organized under it, in the same manner as a reservation to the legislature embodied in a special charter. Such reservation in a special charter or under a general law, negatives an intention on the part of the legislature to confer irrevocable rights upon the corporators."

And again on page 75:

> "The force of the doctrine announced in the case of *The Dartmouth College vs. Woodward,* 4 Wheat. 518, that the creation of a private corporation by charter is such a grant as includes an obligation of the nature of a contract which no state legislature can pass laws to impair, has been, in a large measure, obviated by the practice of reserving to the state the right to alter, revoke or repeal charters, general incorporation laws, and special privileges

and immunities. Whether such special privileges and immunities be designated property or capacity to acquire and hold property, a wise public policy suggests, that they should not be irrevocably placed beyond the sovereign control of the state."

To the same effect is the decision of this Court in *Hamilton Gas Light Co. vs. Hamilton City,* 146 U. S., 258, the Court in the opinion by Mr. Justice Harlan (page 270) saying:

"This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligations of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

This principle has been repeatedly affirmed by this Court. Thus in *Calder vs. Michigan,* 218 U. S., 591, in which the Grand Rapids Hydraulic Company claimed that its constitutional rights were impaired by repeal of its charter, the court after pointing out the power of amendment of repeal reserved in the charter held (syllabus) that:

"A corporation contracts subject, and not paramount to, the reservations in its charter and can-

> not by making contracts or incurring obligations, remove or affect such reservations."

And in *Ramapo Water Co. vs. City of New York,* 236 U. S., 579, where the Water Company sought to restrain the City from proceeding with the construction of a water system, it was held (syllabus) that:

> "Where the constitution of the state reserves the right to do so, the charter of a corporation may be repealed without impairing the obligation of a contract."

And at page 583 the court say:

> "The charter of the company could of course be repealed without impairing the obligation of a contract as the right was reserved, as usual, in the constitution of the state."

It is further true that any rights which may have been acquired under the Power Company's charter were taken, not only subject to all subsequent legislation, but especially to all general legislation existing at the date of incorporation.

Lehigh Water Co. vs. Easton, 121 U. S., 388.

And this principle has been specifically applied by this Court to the taking of water for a municipal water supply as affecting water power companies.

St. Anthony Falls Water Power Co. vs. Water Com. St. Paul, 168 U. S., 349.

There is, however, nothing in the general legislation under which the Power Company was incorporated that purports to confer any exclusive rights or any vested right or franchise to special or exclusive privileges in any river, stream or other waters of the state to companies organized thereunder. These laws authorize the formation of such corporations but make no direct or definite provision as to any specific locality in which they

are to operate. There is no requirement that, having been formed, they shall perform any public service whatever. They are free to carry out the purposes named in their articles, or such part thereof as they may deem advantageous, as they see fit. The filing of articles of incorporation by one set of incorporators would not prevent the incorporation of another company with like purposes, nor would the designation of certain termini or the specification of a certain river in the articles of incorporation of one company preclude the organization thereafter of another company naming the same river for its field of operations.

The incorporators, to give a necessary definiteness to its purposes for indicating what shall be *intra vires* and *ultra vires,* recite in general language where the corporation is to conduct its operations, but these purposes may be enlarged or diminished or wholly unperformed. In this particular case the original articles of incorporation of the Power Company state in substance that it was formed for the purpose of building and operating dams in the Cuyahoga River, erecting a power plant and constructing line or lines of poles for transmitting electricity and specified that its improvements were to be between certain points on the Cuyahoga River. This might involve a very extensive water power development or a very small one. The company might proceed to develop and use all of the water power of the river between those points, or but a very small part thereof as it should see fit, and it might erect one dam or several.

It seems to us impossible to read into the general language of this statute any intention of conferring any exclusive rights upon corporations which may be organized under it and there certainly cannot be read into this

general law the intention to confer any such exclusive rights of the extravagant character claimed by appellant.

> "An exclusive right to enjoy a certain franchise is never presumed, and unless the charter contains words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed."
>
> *Pearsall vs. Great Northern Ry.*, 161 U. S., 646, at p. 664.
>
> See also *Bank of Commerce vs. Tennessee*, 163 U. S., 416, 424.

Not only does the law contemplate the possibility of more than one company being incorporated to operate in a particular territory, but it must also be construed with reference to the paramount rights of the state in the waters of the state, its rights as Trustee for the public to make use of such waters for public needs and the then existing legislation specifically authorizing municipalities to construct water works and appropriate water for the use of their inhabitants.

In *St. Anthony Falls Water Power Co. vs. St. Paul Water Commissioners*, 168 U. S., 349, (hereinbefore cited) a water power company, authorized by its charter to construct and maintain dams in the Mississippi River, claimed that such charter constituted a contract with the State of Missouri and that a statute authorizing the City of St. Paul to construct certain water works upon the river and divert some portions of the natural flow of the water without compensation to plaintiff was a violation of the federal constitution as impairing the obligation of the contract contained in the charter. The court in its opinion in part said:

"We think this contention cannot be maintained. We are of opinion that the true construction of these territorial charters does not give such contract rights as are claimed by the plaintiffs in error. They were grants of power to the respective companies, under which they were licensed to build their dams out into the river for the purpose of utilizing the power, and of using the water that flowed down the river. These grants were in legal effect subject at all times to the paramount right of the State as trustee for the public to divert a portion of the waters for public uses, and they were also subject to the rights in regard to navigation and commerce existing in the General Government under the Constitution of the United States. See also upon this subject, *Watuppa, etc., Co. vs. Fall River,* 147 Mass., 548; *City of Auburn vs. Union Waterpower Co.,* 38 Atlantic Rep. 561, Supreme Court of Maine, Oct. ...., 1897. There was no contract by virtue of these charters that the companies should always and for all time be entitled to all the natural flow of the water in the river without regard to the right of the State as above mentioned. The claim made by the companies seems to us most extravagant. The State or any particular subdivision thereof acting under its authority would, if these claims were valid, be forever thereafter prevented from using any portion of the waters of the river for any public purpose unless compensation for such use were first made these plaintiffs. This construction of the meaning of the charters assumes the power of a territorial or state legislature to bind future legislatures in dealing with these public rights, and it prevents the latter from providing for the use of any portion of the waters for public purposes of the most important character without first making compensation to the plaintiffs for that use. If we should assume the validity of an act of the legislature of such a character, (which, under the decision of this Court in *Illinois Central Railroad vs. Illinois,* 146 U. S., 387, is at least doubtful), it is clear that we ought not to adopt a construction leading to that result unless the legislative act be plain and

beyond all doubt. We are of opinion that these particular charters of the plaintiffs are not to be thus construed. The sections of the acts which are material upon this point simply authorize the companies to maintain their dams and sluices, and permit them to construct and maintain other dams, etc., for the purpose of manufacturing, or for improving any water power owned or possessed by the companies, in such manner or to such extent as shall be authorized by the directors. But there is no language in the acts providing that the companies shall thereafter and always have the right to the use of all the natural flow of the water down the river. Nor is such right a necessary and legal consequence of the language used. They may have acquired by these acts the right to build dams, etc., and the right to use such water as in fact and from time to time should flow down to their dam, but there is nothing in the language of the charters showing or implying that it was the intention of the State to grant to these parties the rights now claimed by them. It is difficult to believe that a legislature would ever grant to individuals or companies rights of that nature, even if it be assumed it had the power. It was proper and in accordance with a wise public policy to grant a privilege to these companies to build dams, etc., as stated in the charters, and to permit them, by virtue of the dams and sluices, to use the water that in fact and from time to time might come down the river, but it cannot be supposed that the legislature meant by any grant of this kind to warrant that for all future time no part of the water that might otherwise naturally flow down the river should ever be used under the authority of the State for any public purpose, without compensating the plaintiffs for that diversion."

A similar claim of exclusive rights was denied in *Bienville Water Supply Co. vs. Mobile,* 186 U. S., 212.

We submit that the numerous cases cited by appellant in support of its theory that the fact of incorpora-

tion constituted an exclusive grant to make use of the Cuyahoga River are wholly inapplicable.

In the case of *Piqua Branch State Bank vs. Knoop*, 16 Howard 369, cited in appellant's brief and relied upon as establishing the proposition that the fact of incorporation under a general law constituted a contract with the state which cannot be impaired by future legislation, the court had to do with a corporation which was organized prior to the adoption of the present constitution of the state, when there was no reservation of the right to alter or repeal.

Many of the other cases cited have to do with street railroad or other similar franchises granted by municipal corporations, which municipalities have subsequently undertaken to revoke or otherwise impair.

Still other cases have to do with the location of rights of way by rival railroad companies, but in no case do we find the proposition announced that the mere act of incorporation of a water power company under general law for the purpose of building a dam on a particular river confers any exclusive right to use the waters of the river so as to prevent its use by the state or by a municipality under authority of the state, or even to preclude the incorporation of another similar company under the same general law, which might locate on the same stream.

By the amendment of its articles of incorporation in February, 1912, the purposes of the Power Company were enlarged so as to cover, not only the Cuyahoga River, but a number of other rivers and streams located in seven different counties, the waters so included covering the entire watershed of a very considerable portion of the state. It certainly seems absurd to think that by the mere filing of this amendment the corporation was

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given any exclusive grant to make use of the waters of this great territory, and, in spite of the elaborate and exhaustive citation of authorities contained in appellant's brief in support of this extravagant claim, we think it doubtful if much reliance is placed upon it, and commencing on page 30 of appellant's brief we find the proposition is shifted to the claim that, even if these exclusive rights did not flow from the mere filing of articles of incorporation, nevertheless the subsequent action of the corporation in adopting certain plans, surveys and descriptions brought into existence actual property rights which it claims are now being invaded.

II. Effect of the Corporate Action of the Power Company in the Adoption of Plans and the Institution of Proceedings Set Forth in the Bill.

Appellant claims that, even if by the mere filing of articles of incorporation the Power Company did not acquire the vested and exclusive rights hereinbefore mentioned, nevertheless by reason of the various proceedings set forth in the bill it acquired a vested and indestructible franchise right to the waters of the streams and rivers and to the various locations specified in the plans covering its water power project and an actual equitable title to the lands and property interests involved in said plans. These corporate acts and proceedings are recited at length in the bill and have been analyzed by us in the preceding discussion of facts contained in the brief. Summarized, they fall into two classes: First, the adoption of plans, maps, surveys and descriptions by corporate resolution, and second, the institution of certain proceedings preliminary to the appropriation of property rights.

We submit that the District Court below was right in holding that

> "In Ohio the declaration upon the private records of a corporation of an intention to construct an improvement upon or over any lands without further action taken or payment made does not give to the corporation any title or right whatever, legal or equitable, in the lands embraced within such paper scheme." (Opinion of Judge Clarke, Rec., page 49.)

The Ohio Nisi Prius case cited in the opinion, *Columbus Terminal and Belt Co. vs. Toledo and Ohio Central Railway Co.*, 32 Ohio W. L. B., 186, although of an inferior court, contains a statement of what we believe to be settled law in Ohio. This case was decided by the Common Pleas Court of Franklin County, Ohio, and the court on page 187 says:

> "But the grant, by articles of incorporation, to a railroad company of the right to construct a road, is afloat; it attaches to no specific lands, until the line of the road is definitely fixed by purchase of the land, or by condemnation proceedings and the acceptance of the land condemned. The grant only fixes the terminal points. Even after the land is condemned, the railroad company may elect not to pay the price and accept the land. After, however, it has paid the price ascertained by the jury, and accepted the land, it has exhausted its right of selection, and the grant and the route are then, and not until then, firmly anchored to the specific strip of land so condemned, paid for and accepted—so firmly anchored that the company would probably have no right to change or vary the route without legislative consent.
>
> The fact that a railroad company has surveyed and staked a line upon certain ground does not conclude it. Why then should it conclude anybody else? The company may survey and stake more than one line, and by comparing the cost and advan-

> tages of each of them, determine upon which it will build. But the line is not definitely established, located, till the land is condemned, paid for and accepted, or purchased by agreement."

It is also well settled in Ohio that the mere institution of appropriation proceedings confers no title of any kind.

State of Ohio ex rel. vs. Cincinnati & Indiana Railroad Co., 17 O. S. 103, where the court states at page 109:

> "No appropriation of the lands of the relators could be completed, nor title from them could be acquired and no encumbrance could be imposed on their estate by the railroad company until the amount of compensation fixed by the findings of the jury was paid in money, or secured to be paid by a deposit of money."

There can be no question but that this is the law in Ohio and there is nothing in the Ohio cases cited in appellant's brief on this subject that establishes any proposition to the contrary. The case of *Calender vs. Painesville, etc., R. R. Co.*, 11 O. S., 516, which seems to be so greatly relied upon and is discussed at length in appellant's brief, had to do merely with the question as to whether the description of the road contained in the railroad company's certificate of incorporation stated the location with sufficient definiteness, the railroad company having claimed that the description was so indefinite as to make its organization defective so that a suit could not be maintained against it as a corporation; and *Hamilton G. C. Traction Co. vs. Hamilton & L. Electric Transit Co.*, 69 O. S., 402, also relied upon by appellant, involved merely a controversy between two rival street railroad companies under opposing municipal franchises.

Without discussing or analyzing the other cases on this subject cited in appellant's brief, most of which will be found to be cases involving a controversy upon prior locations by conflicting railroad companies, we submit that the claim here made: namely, that a mere railroad route or other similar project existing on paper only and evidenced only by private maps and corporate resolutions, constitutes a vested property right, which precludes the taking of the property covered by the paper route or project in question by the State or a municipality when needed for public use, has never been affirmed by authoritative judicial decision.

On the contrary, however, we think it clear that the precise question has been determined adversely to the appellant's claim by this Court.

Adirondack Ry. Co. vs. New York State, 176 U. S., 335;
Underground R. R. vs. City of New York, 193 U. S., 416;
Ramapo Water Co. vs. City of New York, 236 U. S., 579.

In the *Adirondack Railway case* the railroad company's charter authorized it to construct its railroad over the route in question and the company, by private corporate action, had located a route and filed its map, the filing of the map having been done in pursuance of statutory requirement. The State of New York undertook to appropriate the property including part of the route in question for a forest preserve under the Adirondack Park Act, and suit was brought to enjoin the acquisition of the land in question by the state. The Court of Appeals of New York in *People vs. Adirondack Ry. Co.*, 160 N. Y., 225, decided adversely to the railway company and held, quoting from paragraph 5 of the syllabus:

> "There is no property in a naked railroad route existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation."

This Court, in *Adirondack Railway vs. New York State, supra*, affirmed the decision of the Court of Appeals of New York and in the opinion expressly stated its approval of the view of the New York court that the mere filing of the map created no lien or any right in the nature of a lien as against the State.

The *Underground Railroad case* above referred to, 193 U. S., 416, likewise involved a question as to the accrual of exclusive rights by the filing by a railroad company of a map or profile, the court holding, quoting from the second paragraph of the syllabus:

> "The mere filing of a map and profile, and the payment of the regular incorporation tax, by a company, organized under the general railroad law of 1850 of New York, but which did not obtain the consents of municipal authorities or of abutting property owners or substituted consent of the Supreme Court, or acquire any property by condemnation, did not create a contract with the State for the exclusive use of the space included in the map and profile, and a subsequent act of the State authorizing the construction of a railroad partly over the same route, does not violate the impairment of contract clause of the Constitution of the United States."

In the last of the cases above cited, viz., *Ramapo Water Co. vs. New York*, the facts are substantially similar to the facts here and the claims advanced by the water company in all respects identical with the claims here asserted by appellant. The court, however, held, quoting again from the syllabus:

> "In the absence of a specific decision of the highest court of the State to that effect, this Court will not construe a statute authorizing a water supply corporation to exercise eminent domain under the provisions of the Railroad Act as giving to that corporation a vested right to exclude the rest of the world from whatever watersheds it chooses for an unlimited period and one that cannot be impaired by subsequent legislation simply by filing a map."

In *Bauman vs. Ross*, 167 U. S., 548, at page 596, it was held that no rights were acquired by the mere filing of a map.

In view of the above decisions of this Court, the many cases cited by appellant relating to priorities of railroad appropriators can have no bearing. A railroad location is of a definite right of way covering a specific strip of land which may be indicated by plans and descriptions and by statute in some states the filing of such a map in a public office is required and has been held to be in itself an act of appropriation although, as we have pointed out, such is not the law in Ohio where the actual payment of compensation must precede the acquisition of any rights in private property. Undoubtedly, as a mere matter of expediency between private railroad corporations, the corporation which first commences the exercise of the right to appropriation by proper proceedings should be held entitled to retain the property appropriated as against a later appropriation or location by another company. Otherwise there might be no end to conflicting appropriations of such corporations. But, as between a private corporation having the right of eminent domain for carrying on a business of a quasi public nature and a subdivisoni of a sovereign state, like a municipal corporation which exercises the power of eminent domain to meet the most vital needs of its population for

a supply of water, there can be no question but that the latter is given a paramount right to appropriate property needed for that purpose although the same property has become the subject of earlier appropriation proceedings by a private corporation.

In the present case, however, as pointed out in our discussion of the facts, it does not appear that there is any appropriation suit pending with respect to any lands which have been taken by the City.

It is true that the bill of complaint alleges that "at all times since June 1st, 1908, there have been and now are pending in the courts of Ohio one or more suits by said Power Company as plaintiff for the appropriation by said Power Company of one or more parcels of land in, along or abutting on the Cuyahoga River." The only appropriation suit however which is specifically mentioned is that which the bill alleges was instituted in June, 1908, against a number of property owners, but which appears to have ended adversely to the Power Company. There is no averment of the pendency of any other suit nor of any particular land on the Cuyahoga River that is subject to any such suit.

III. The Bill Does Not Set Forth Any Facts Sustaining Appellant's Claim to Equitable Relief as the Owner of Any Riparian Rights.

As to appellant's claim that the Power Company is the owner of riparian lands along the Cuyahoga River with riparian rights incident thereto, and as such riparian owner is entitled to the relief sought, we submit that there are no facts shown which sustain any such claim.

In the first instance, appellant claims such ownership by reason of the pendency of appropriation suits.

As previously pointed out, it does not definitely appear that there is any appropriation suit pending with respect to any land to which any riparian rights attach which are being invaded by the City, but, even if any such appropriation suit were pending as against land abutting on the river, it would not under Ohio law give any title to the Power Company in such land so that it could assert any rights against third parties as a riparian owner. Any appropriation made by the Power Company it is provided in Section 10129 of the General Code, set forth in page 3 of the record, must be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations.

The provisions governing the appropriation of private property by corporations are set forth in Sections 11038, 11059, 11060, 11070, 11074, 11087, 11088 and 11091 of the Ohio General Code, and provide that possession shall not be taken of the land sought to be appropriated until after payment of the condemnation money or its deposit in court, and also that the corporation may abandon any proceeding at any time at its option upon the payment of costs. In view of these provisions the Ohio courts have held that no title, either legal or equitable, is obtained until compensation fixed by the jury has been paid or secured to be paid.

State of Ohio ex rel vs. Cincinnati & Indiana R. R. Co., supra.

Wagner vs. Railway, 38 O. S., 32.

It is obvious therefore that, in view of the Ohio statutory provisions as construed by the Supreme Court of the State, no title to any riparian rights with respect to any lands which the Power Company has sought to ap-

propriate has vested in the Power Company so as to enable it to sue here as a riparian owner.

In addition to its claims based on the institution of appropriation proceedings, appellant claims as such riparian owner by reason of certain alleged purchases of land and the acquisition of options to purchase. As pointed out in our discussion of the facts, the only land, title to which has actually been acquired, is the Keller parcel, being a small parcel of .22 of an acre situated in Cuyahoga Falls and located on the bank of the Cuyahoga River above high water mark. This parcel was not acquired until June 18th, 1915,—several years after the City had entered upon its water works improvement and with full knowledge on the part of the purchaser of the City's plans and of all that had been done. In this situation a court of equity will certainly not enjoin the carrying out of a great public improvement on account of any possible impairment of a private riparian right acquired under such circumstances. If it should turn out that any damages in fact were done to the land, the owner could no doubt recover damages.

Furthermore, it should be noted that the description of the so called Keller parcel set forth in the bill (Rec., page 10) describes the land as running only to the *high water mark* of the river. It is therefore seen that the premises do not come in contact with or touch the water of the stream, at least at any stage except high water mark, which would be reached only at certain periods of the year at times of flood. Such a description conveys no riparian rights such as are claimed by appellant.

Gould on Waters, 3d Ed. Sections 194-201;
Water Co. vs. Strawboard Co., 53 Fed., 970.

The court in the above case in the course of its opinion (page 974) says:

> "It is necessary for the existence of a riparian right that the land should be in contact with the flow of the stream. All riparian rights depend upon the ownership of the land which is contiguous to and touches upon the water. *Jones vs. Johnston,* 18 How. 150."

See also:

> *Allen vs. Webber,* 27 Amer. St. Rep. 51;
> *Cook vs. McClure,* 58 N. Y. 437.

The acquisition of the Boetler property (Rec., page 10) involved no purchase of land abutting on the river, but only some part of the bed of the river itself, and we submit that such a purchase of bed of the river does not constitute the purchaser a riparian owner. A riparian right of the nature here sought to be protected is the right which attaches to land bordering on the bank of a stream to have the water flow in its natural course so that it may be enjoyed in connection with the use of the land. Apart from the ownership of the land the right does not exist.

Furthermore the bill shows that as regards any rights in the Boetler property, no legal title has been acquired, but as yet rests only in contract.

With respect to the options mentioned on page 11 of the record there is no averment that any lands covered thereby are located on the bank of the river or have any riparian rights attaching to them. Furthermore, all of these properties, whether lying merely in option or otherwise, were all acquired long after the City had commenced the construction of its public improvement and equity will not permit their purchase under these circumstances to form the basis of an injunction preventing

the accomplishment of the City's work. It should be borne in mind that the City has long since completed this improvement, has for several years been diverting water for its supply, but so far no complaint on the part of the actual owners of this property, with respect to which the Power Company claims to have contracted, has been heard.

We submit that appellant's claims to equitable relief have been in no way bolstered up or fortified by the acquisition since this controversy arose of the small parcel in Cuyahoga Falls or the other indefinite contract and option rights set forth in the bill.

IV. There Has Been No Taking of Property Without Due Process of Law in Violation of Constitutional Provisions.

Part Second of appellant's brief contains an argument that appellant's property has been taken without due process of law because no compensation has been made and the City disclaims any intention of making compensation.

This claim presupposes of course that the Power Company, by reason of its incorporation and the adoption of its project, has acquired a property right to the exclusive use of the waters involved in the project, or as riparian owner has acquired such rights. As was said by the court below in its opinion (Rec., page 48) "There is no allegation that any part of the land which the Power Company owns is actually invaded by any of the constructions of the defendant and the real substance of the complaint is that the Power Company's *project* of utilizing the water of the Cuyahoga River and many other streams for many miles would be impaired by the City's use of the waters of the river as threatened."

As heretofore shown, this paper project is not property, the interference with which by the City required compensation to be made, and we will not further discuss that proposition. If any damage has been done to the Power Company as a private riparian owner it can recover compensation at law, or, under the Ohio statutes, can compel appropriation.

It is further claimed that the taking by the City is without due process of law because its threatened diversion of water is for private use, the amount proposed to be taken being greatly in excess of the public requirements of the City.

The necessity for and the extent of the taking of private property by a municipal corporation under the power of eminent domain is for the municipal authorities or the legislature to determine and in the absence of fraud their action is final; and the exercise of such authority under state law will not be interfered with by the United States.

> "The exercise by the state of its sovereign right to eminent domain, cannot be interfered with by the United States; but when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed, is a proper matter for judicial cognizance."
>
> *Mississippi Rum River Boom Co. vs. Patterson*, 98 U. S. 403.

> "While courts have power to determine whether the use for which private property is authorized by the Legislature to be taken is in fact a public use, yet the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made."
>
> *Shoemaker et al vs. United States*, 147 U. S., 282.

"The quantity of land to be taken for public use is a legislative and not a judicial question; the effect of taking a part upon the rest of the land remaining is a mere question of compensation."

United States vs. Gettysburg Electric R. Co., 160 U. S., 668.

"Under the statute authorizing the appropriation of private property for a public wharf by a municipal corporation, the discretion of determining the quantity of ground required for such purpose is vested in the corporation; and where, in making the appropriation, this discretion has been exercised by the municipal authorities in good faith, their action is final."

Iron R. R. Co. vs. Ironton, 19 Ohio St., 299.

"Whether the power of eminent domain shall be put in motion for any particular public purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise are questions which rest entirely with the legislature. 'When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance.' 'The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated are questions appertaining to the political and legislative branches of the government."

Lewis on Eminent Domain, Section 369.

"Of the necessity or expediency of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such

a question is essentially political in its nature and not judicial."

Dillon on Municipal Corporations, Fifth Edition, Sec. 1036.

Nor can it be objected that other property is equally available for the City of Akron for water works purposes.

"It may be objected that there is no necessity of condemning the particular property, because some other location might be made or other property obtained by agreement. But this objection is unavailing. Except as specially restricted by the legislature, those invested with the power of eminent domain for a public purpose, can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts."

Lewis on Eminent Domain, Third Edition, Section 604.

So also in determining the extent of the appropriation future requirements may and should be considered. In the appropriation of property by a municipal corporation, sufficient may be taken for future requirements, especially for water supply.

Dillon on Municipal Corporations, Section 1027.

The municipal corporations of Ohio are authorized by the Constitution to appropriate an excess over that actually needed.

"A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so

appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

Section 10, Art. XVIII, *Constitution of Ohio.*

As an incident to securing a public water supply, the City of Akron may appropriate more water than is needed for its present purposes, and dispose of the surplus for an outside or private use, and such taking does not deprive the condemnation of land for water works of its public character.

"The improvement of the navigation of a river is a public purpose and the sequestration or appropriation of land or other property therefore, for such purpose, is doubtless a proper exercise of the authority of the state under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands in order to preserve at all times a sufficient supply for the purpose of navigation. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the state to let out the use of it to private parties, and

thus reimburse itself for the expenses of the improvement."

Kaukauna W. P. Co. vs. Green Bay & M. Canal Co., 142 U. S., 254, 273.

See also *Elevator Co. vs. Cincinnati*, 30 O. S. 629.

V. The Allegations of the Bill Charging Fraud Are Insufficient.

It is claimed that the action of the City in purporting to take the water for public use was fraudulent, the bill of complaint in paragraph Twenty-seventh (Rec., p. 18) alleging: "The plaintiff further charges and avers that the action of the defendant in attempting to take the water of the Cuyahoga River is not for any real or supposed benefit or advantage to the inhabitants of the defendant, but is taken in bad faith and fraudulently for the private benefit and advantage of certain individuals and private corporations, adversely to the interests of the public and pursuant to a conspiracy, plan and agreement between certain of the officials of the defendant and said individuals and private corporations."

As to appellant's allegations of fraud, it is submitted that Judge Clarke was correct in his opinion that the averments in plaintiff's bill with respect to the fraudulent conduct of the officers of the City of Akron were mere conclusions of the pleader, no facts being stated upon which a court might base an opinion that the conduct complained of was fraudulent.

The general rule governing the pleading of facts in an allegation of fraud is as follows:

> "A bill seeking relief on the ground of fraud must distinctly and specifically charge the fraud. It must state the specific facts and circumstances constituting the fraud, and the facts so stated must be

sufficient in themselves to show that the conduct complained of was fraudulent. General charges of fraud or that acts were fraudulently committed are of no avail, unaccompanied by statement of specific facts amounting to fraud." 16 Cyc. 231.

This court has held strictly to the rule as set out above. In *Ombler vs. Chotaou,* 107 U. S. 586 (1882), the court (quoting from the opinion of Chief Justice Waite) says:

"But whether that be so or not no case has been made by the loose and general allegations in this bill for relief against these defendants. The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity until connected with some specific acts for which one person is in law responsible to another. They have no more effect than other words of unpleasant signification."

And in *St. Louis vs. Johnston,* 133 U. S. 566, 577, Mr. Chief Justice Fuller, delivering the opinion, said:

"Certainly there must be sufficient equity apparent on the face of a bill to warrant the court in granting the relief prayed; and the material facts on which the complainant relies must be so distinctly alleged as to put them in issue and if fraud is relied on, it is not sufficient to make the charge in general terms. 'Mere words in and of themselves are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud and a breach of trust, for which a court of chancery can give relief.'"

Van Weel vs. Winston, 115 U. S. 228, 237.

"The defendant should not be subject to being taken by surprise and enough should be stated to justify the conclusion of law, though without undue minuteness."

In *Fogg vs. Blair*, 139 U. S., 118, it was held Syl. 3:

> "In a suit brought against contractors for the construction of a railroad to hold them liable for the face value of stock received by them in payment for work done, the bill alleged that they got $12,000 in the company's first mortgage bonds for each mile of constructed road, and in addition, $850,000 in its stock, and that the mortgage bonds received by them were full and adequate compensation for the work; but there was no allegation as to the real value of the stock. Held, that the bill was bad on demurrer; that it should have shown that the stock was of some value; and that the general allegations that the arrangement was a 'fraud,' a 'breach of trust,' a 'scheme' and 'colorable' without stating the ultimate facts upon which they were based, were only allegations of conclusions of law, which the demurrer to the bill did not admit."

Again, the Supreme Court in *Hammond vs. Hopkins*, 143 U. S. 224, 251, Mr. Chief Justice Fuller delivering the opinion, said:

> "In *Stearns vs. Page*, 7 Howard 229, Mr. Justice Greer, speaking for the court, said that a complainant seeking the aid of a court of chancery, under such circumstances of lapse of time as there existed: 'Must state in his bill distinctly the particular act of fraud, misrepresentations or concealment—must specify how, when and in what manner it was perpetrated. The charge must be definite and reasonably certain, capable of proof and clearly proved.'"

See also:

Marquez vs. Frisbie, 101 U. S., 573, 578;
Pullman Car Co. vs. No. Pac. Co., 115 U. S. 587, 596;
Kent vs. Lake Superior Canal Co., 144 U. S. 75, 91.

We submit, therefore, that the bill does not sufficiently allege fraud. The allegations of the bill are conclusions merely and do not state issuable facts.

VI. There Was No Lack of Power in the City, Either Under the Statutes or Constitution of the State to Undertake the Public Improvement in Question or Appropriate Property Therefor.

The City now has and had at the time of the commencement of the undertaking in 1912 ample authority for its acts under the Constitution and laws of Ohio. Sections 3677 and 3679 of the General Code of Ohio, as compiled and adopted in 1910, (which are set forth in the Record, pages 13 and 14) and which, it is claimed by appellant, are contrary to and in violation of the Constitution of the United States as impairing the Power Company's alleged grant from the State, are in fact merely a codification of similar provisions existing long prior to 1910 and long prior to the incorporation of the Power Company.

By Section 2232 of the Revised Statutes of Ohio, passed March 8, 1887, it was provided that—

> "Each city and village, may appropriate, enter upon, and hold, real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied.
>
> * * * * * *
>
> 12. For water-works; and for this purpose the right to appropriate, shall not be limited to land lying within the limits of the corporation."

By an Act passed October 22, 1902, it was provided as follows:

> "Section 9. All municipal corporations shall have the following special powers which shall be exercised in the manner hereinafter provided:
>
> First: To appropriate property for public purposes.
>
> * * * * * *

Section 10. All municipal corporations shall have power to appropriate, enter upon, and hold real estate within the corporate limits, for the following purposes:

* * * * * *

Eleventh: For water-works, natural and artificial gas and electric lighting, heating, and power plants, and for supplying the products thereof.

Section 11. In the appropriation of property for any of the purposes named in the preceding section the corporation may, whenever the same is reasonably necessary acquire property outside the limits of the corporation * * *."

Laws of Ohio, Vol. 96, pp. 26, 27.

By an Act passed April 27, 1908, sub-division 11 of section 10 was amended so as to read as follows:

"11. For water works, for reservoirs to provide a supply of water, for natural and artificial gas, electric lighting, heating and power plants, and for supplying the product thereof."

Laws of Ohio, Vol. 99, p. 207.

In the General Code of 1910 the language of Sub-section 11 as it appears in the Act of April 27, 1908, is repeated and by the amendment of March 10, 1910, the subject of water works is omitted from sub-section 11 and a new sub-section 13 (as quoted on page 13 of the Record) is added, the language being as follows:

"13. For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without the limits of the corporation; and for this purpose any such municipal corporation may appropriate in the manner provided in this chapter, any

property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise. Either party to such appropriation proceedings shall have the same right to a change of venue as is now given by law in the trial of civil actions."

Ohio General Code, as amended March 10, 1910; *Laws of Ohio*, Vol. 101, p. 15.

It is not deemed material further to pursue the history of this legislation in its earlier stages since from the above summary it appears that as early as 1887 municipal corporations in Ohio had the power to appropriate property for water works, as well as for other purposes. It is clear, therefore, that long before the incorporation of the Power Company, powers of eminent domain, appropriate to the present undertaking, had been conferred upon the City. Any rights, therefore, which the Power Company may have acquired by its incorporation in 1908 or by the amendment to its articles filed in 1912, were subject not merely to the general rights of eminent domain to which private property is subject and the reserved rights of amendment, alteration and repeal to which the charters of Ohio corporations are subject, but also to actual existing powers of eminent domain conferred upon the City by legislation enacted long prior to the Power Company's charter.

It is claimed, however, that the constitutional amendment, adopted September 3, 1912, and which took effect November 15, 1912, repeals this existing legislation and left the City without authority to proceed with its water works improvement, except in accordance with the provisions of the constitutional amendment and that these provisions have not been followed. The constitutional amendment in question provides as follows:

"Section 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a Charter Commission."

It is claimed that this constitutional amendment impliedly repealed all existing laws inconsistent with it and that, therefore, the previous councilmanic action taken by resolution adopted May 27, 1912, and by ordinance adopted August 26, 1912, was nullified, the City not actually having commenced the construction of the proposed improvement prior to November 5, 1912, when the amendment took effect.

In the first place, we submit that the constitutional amendment operated prospectively only and did not operate retroactively to invalidate the acts of the City theretofore taken under authority of law.

"Constitutions operate prospectively only, unless on their face the contrary intention is manifest beyond reasonable question."

Shreveport vs. Cole et al., 129 U. S., 36.

"We shall venture also to express the opinion that a constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect. This is the rule in regard to statutes, and it is 'one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively.' Retrospective legislation, except when designed to cure formal defects, or otherwise operate remedially, is commonly objectionable in principle, and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to enact it. And we are aware of no reasons applicable to ordinary legislation which do not, upon this point, apply equally well to constitutions."

Cooley's Constitutional Limitations, Seventh Ed., page 97.

The case of *Dravo-Doyle Co. vs. Village of Orrville*, 93 O. S., 236; 112 N. E., 508, one of the cases cited in appellant's brief expressly holds that franchise or contract rights acquired prior to the adoption of the amendment to the Constitution were not abrogated or affected by the subsequent adoption of the constitutional provision and that contracts made subsequent to the adoption of the constitutional provision are controlled thereby and are enforcible.

See also *Case vs. Dillon*, 32 O. S., 607, 608; *State ex rel. vs. Trustees*, 8 O. S., 394, 400; *Albire vs. State*, 10 O. S., 589.

However, we submit that Sections 3677, 3678, 3679, 3680, 3681 and 3682 of the Ohio General Code, which authorize the appropriation of property by municipal corporations for water works purposes are not repugnant to or inconsistent with the Constitution as amended in 1912, but on the contrary, are in entire harmony with the amendment.

In *State of Ohio vs. Cameron et al.*, 89 O. S., 214, it is said:

> "Repeals by implication are not favored and before a statute is so repealed, the repugnancy must be necessary and obvious and if by any fair course of reasoning the law and constitution can be reconciled, the law must stand."

See also *M. V. Ry. Co. vs. Santoro*, 93 O. S., 53.

The only ground upon which appellant bases the claim of inconsistency appears to be because the constitutional amendment provides for a referendum on municipal ordinances for the acquisition or construction of a public utility. An examination of the statutes, however, will disclose that at the time of passage of these councilmanic proceedings and prior to the adoption of the constitutional amendment the Ohio law already provided for a referendum election upon city ordinances involving such matters. Section 4227-2 of the Ohio General Code, then in existence, provided:

> "Any ordinance, resolution or other measure of a municipal corporation granting a franchise, creating a right involving the expenditure of money or exercising any other power delegated to such municipal corporation by the General Assembly shall be submitted to the qualified electors for their approval or rejection in the manner herein provided, if within thirty days after the passage or adoption of such ordinance, resolution or measure by the coun-

cil there shall be filed with the city clerk of such municipal corporation a petition or petitions signed by fifteen per cent. of the qualified electors of such municipal corporation * * *."

It is apparent therefore, that the passage of ordinance No. 3396 by the city council on August 26, 1912, was at that time subject to a referendum vote, if an appropriate petition therefor should be filed.

The constitutional amendment in question was intended to broaden the powers of municipal corporations with respect to the acquisition and operation of public utilities and did not in any way intend to limit the powers of appropriation for such purposes theretofore by law existing.

Furthermore, the City of Akron in undertaking to improve its water supply by the construction of the dam and reservoir in question was not, we submit, acquiring or constructing a public utility within the meaning of the constitutional amendment. The City already had a water works and was itself operating a public utility. It was not about to engage in any new municipal ownership enterprise but was simply proceeding to enlarge and improve the public utility which it already owned and had for many years been operating. The case seems to be quite analagous to the facts in *Shryock, a Tax Payer, vs. City of Zanesville*, 92 O. S., 375; 110 N. E., 927, which is also cited in appellant's brief. In that case the Supreme Court of Ohio held where a very similar claim was made with reference to the erection of a filtration plant in connection with a municipal water supply, that such erection was not within the provisions of Sections 4 and 5 of the new constitutional amendment, the court on page 379 of the opinion, saying:

"It is quite evident that these provisions of the constitution were to have no reference to utilities municipally owned and already in operation but the plain purpose was to enlarge the powers of municipalities in the construction, acquiring, owning, leasing and operating of utilities not already so constructed, acquired, etc., and to facilitate the construction, owning, etc., of utilities by municipalities within the limitations and safeguards of Section 5, Article XVIII."

It is contended in appellant's brief that the construction of these improvements by the City amounts to the acquisition of a new utility within the meaning of the court's opinion in the *Zanesville case*. We submit, however, that there are no facts set forth in the bill upon which such claim can be predicated.

VII. The Allegations of the Bill With Respect to the City's Inability to Pay Damages do Not Amount to an Averment of Insolvency, Nor Are Any Facts Shown Which Sustain Such Claim of Financial Inability.

It is claimed by appellant in Part Fourth of its brief (p. 84) that the City's failure to take any steps to have compensation awarded to the Power Company and its assertion of no liability to make compensation, together with the allegation in the bill that the City is without funds with which and is financially unable to pay the damages which may be caused to the Power Company, constitutes a ground for injunctive relief.

Of course the City's denial of liability to pay does not preclude either the Power Company or appellant from recovering damages, if any property or property rights of the Power Company or of appellant as mort-

gagee of such property have been or shall be taken by the City or damaged or impaired by its acts. Appellant counts, however, on the allegations of the bill with respect to financial inability on the part of the City, the allegation being:

> "Said defendant is furthermore without funds with which and is financially unable to pay the damages which will be caused to said Power Company by a diversion of the waters of the Cuyahoga River in accordance with the announced plan and intention of the defendant or to pay any reasonable or substantial compensation for the property of said Power Company of which said defendant is depriving said Power Company and said defendant has not made any provisions for raising or obtaining the money necessary to pay such damages and compensation and, by reason of the debt limit fixed by the statutes and Constitution of Ohio, said defendant is and will be unable to raise or obtain the money necessary for that purpose." (Bill, Paragraph 32, Rec., page 20.)

The court below announced that "it would refuse in obedience to any technical law to accept as true any such allegations."

We submit, however, that there is no technical rule by which this allegation should be taken as a proper pleading of insolvency. It is not averred that the City is insolvent, nor are any facts set forth showing such insolvency, the statement being merely that the City has no funds with which and is financially unable to pay the damages which will be caused to the *Power Company*.

Upon the theory of the bill the damages accruing to the Power Company by reason of the alleged total destruction of its project are very large. The damages, however, which the bondholders would sustain could be no more than the amount of their bonds with interest and there is no allegation that the City will be unable

to pay such amount, and we do not believe that a court of equity need assume from such a statement, lacking as we have said any averment of actual insolvency, that a judgment against the large and important City of Akron for such a comparatively small amount would not be satisfied. Moreover the allegation of the bill that, by reason of the debt limit fixed by the statutes and Constitution of the state, the City will be unable to raise or obtain money necessary to pay any damages is not controlling.

> "Provisions as to debt limit apply only to indebtedness which arises ex contractu and do not apply to involuntary liability arising ex delicto. Hence, the fact that a municipality has exceeded its debt limit is no defense to an action based on a tort."
>
> *McQuillan Municipal Corporations*, Vol. V, Section 2217.
>
> Also *Dillon on Municipal Corporations*, Fifty Edition, Vol. I, Section 201.

The Pennsylvania case, *Keller vs. City of Scranton*, 200 Pa., 130, cited as modifying the above principle in the case of the taking of property by a municipality in the exercise of the right of eminent domain, will be seen upon examination to have been a case in which the municipality in contracting for the improvement expressly assumed all consequent damages arising therefrom. There was no such assumption in the case at bar and any damages accruing to the Power Company would clearly arise in tort. However, the City would not necessarily be compelled to borrow any money or incur any debt to pay any damages accruing to appellant, but could provide for payment through the levying of taxes, and ample provision is made by the laws of the state for such levy. Sections 4506, 4513 and 4517 of the Ohio General Code

expressly provide the machinery for such levy, the sections being as follows:

"Sec. 4506. Municipal corporations having outstanding bonds or funded debts shall, through their councils, and in addition to all other taxes authorized by law, levy and collect annually a tax upon all the real and personal property in the corporation sufficient to pay the interest and provide a sinking fund for the extinguishment of all bonds and funded debts and for the payment of all *judgments final* except in condemnation of property cases, and the taxes so raised shall be used for no other purpose whatever."

"Section 4513. On or before the first Monday in May in each year, the trustees of the sinking fund shall certify to council the rate of tax necessary to provide a sinking fund for the future payment of bonds issued by the corporation for the payment of *final judgments,* except in condemnation of property cases, for the payment of interest on bonded indebtedness, and the rents due on perpetual leaseholds of the corporation not payable from a special fund, and the expenses incident to the management of the sinking fund. The council shall place the several amounts so certified in the tax ordinance before and in preference to any other item and for the full amount certified. Such taxes shall be in addition to all other taxes authorized by law."

"Sec. 4517. The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all *judgments final* against the corporation, except in condemnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

Furthermore, the Supreme Court of the State of Ohio in *State vs. Harrison,* 81 O. S. 98, has held that mandamus will lie against the sinking fund trustees to compel payment of a judgment rendered against a municipality for the wrongful taking of property in connection with the construction of public improvements, expressly holding that such judgment is not a judgment in a "condemnation of property case" within the proviso excepting judgments in such cases from the provisions of the foregoing sections.

In the case of *Cuyahoga River Power Co. vs. City of Akron,* 240 U. S., 462, in which this Court sustained the jurisdiction of the federal court on the ground that the bill in that case raised a question under the federal constitution, the court evidently deemed the averment of insolvency to be important, Mr. Justice Holmes in the opinion expressly stating that the bill alleged the City to be insolvent.

We submit that, if the question of insolvency or inability to pay is material in the present case, there are no allegations in the bill of insolvency, nor any facts stated upon which the court can assume that the City will not be able to provide funds sufficient to satisfy any claim of the bondholders whom appellant represents.

VIII. Appellant Has Been Guilty of Such Laches as Will Preclude the Granting of the Equitable Relief Sought.

As early as May, 1911, by the enactment of House Bill 357, the Power Company was put on notice of the intention of the City to make use of the Cuyahoga River for water supply and knew that such use would (if its claims are now correct) seriously impair its water power

project. Knowing, however, that its then existing corporate purposes were not broad enough to cover the portion of the river to be effected by the City's plans, it hastened to amend its articles of incorporation so as to cover every possible field of the City's operations, filing such amendment in February, 1912.

On May 27th, 1912, the City Council passed its declaratory resolution declaring its intention to appropriate water of the river for water supply in accordance with engineers plans dated June, 1911; and on August 26th, 1912, ordinance No. 3396 was passed authorizing the appropriation of the water, and on the same date ordinance No. 3233 authorizing the proceeding with the proposed improvement and the issuance of bonds to provide for its cost (Rec., pages 12-13).

Although not alleged in the bill, it is admitted in appellant's brief (page 90) that in December, 1912, the City purchased lands for its improvement lying within the territory in which the Power Company claims to have exclusive rights. The Power Company knew of these purchases and it is said (appellant's brief, page 90) negotiated with the City with respect to the purchase of water rights appurtenant thereto, communicating with respect thereto by letter dated March 29th, 1913. It knew of the City's letting contracts for the construction of its works in April, 1913, but still no move is made to prevent the City's going forward with its project or in making the great outlays and incurring the great liabilities incident thereto, nothing but absurd offers and letters of assertion, disclosing a readiness to be dealt with, but evidencing no intention of actually opposing or stopping the prosecution of the work.

Months elapse and on July 14th, 1913, the Power Company brought suit against the City to enjoin the work. This was more than a year after the City by resolution of Council had declared its intention of making the improvements and approximately eleven months after it had passed its appropriating ordinance and issued its bonds. In the meantime lands had been purchased and contracts involving millions had been let and the City irrevocably embarked on and committed to the prosecution of this great public improvement. It was this situation which led the court below to say that "such a state of facts makes sharply applicable the decision of the Supreme Court of the United States in *New York City vs. Pine*, 185 U. S., 92."

The disastrous situation into which the City has been led through the Power Company's standing by and permitting the City to proceed seems to be recognized by counsel for appellant and fairly gloated over, for in Part Third of appellant's brief at page 64 the dilemma is pointed out and it is said that the City has gotten itself into an "impasse." We call attention to the following language in the brief:

> "We submit the following argument (namely, the argument as to the City's lack of power to prosecute the work) to show the utter hopelessness of appellant's position even if defendant should now attempt to comply with the law under mandate of this Court. Appellee has no statutory authority to continue the construction of its plant. If it had the authority, the ordinance of council would be subject to referendum and might, of course, be voted down. If the vote carried, however, and just compensation were awarded the Power Company, the appellee cannot obtain under the debt restrictions any substantial amount and there is no prospect that it can ob-

tain the funds within many years to come. The blind and unreasoning confiscation of defendant has led it into an *impasse.*"

In other words, knowing that the City had no right to construct this improvement and that such construction would involve it in liability to the Power Company for immense damages, which on account of its alleged financial limitations the City could not possibly pay, the Power Company nevertheless stood by and permitted the City to go forward with the expenditure of large sums and incurring of great liability until it had actually gotten into an "impasse" where, inasmuch as it cannot appropriate and pay for the alleged property rights taken from the Power Company, it is left with the sole alternative of stopping work and abandoning all that it had so far put into the enterprise.

We submit that this alleged dilemma, which under appellant's theory of the law exists and which arises through the Power Company's standing by until the City had irretrievably committed itself to the enterprise, presents a situation which cannot appeal to the equitable conscience of the court.

Appellant's rights as Trustee for certain bondholders can rise no higher than the rights of the Power Company, whose property it acquired subject to all conditions then existing. Certain claims however are now asserted by appellant growing out of the alleged acquisition of property and property interests by the Power Company long after the institution of the original suit against the City, and at a time when the improvements of the City were practically completed. Certainly no right to equitable relief by way of injunction can be based on such subsequent acquisitions.

Furthermore the equities of the situation are even more pronounced as against appellant than as against the Power Company when it brought suit in July, 1913, firstly because representing merely creditors whose claims are purely monetary and can rise no higher than satisfaction of their indebtedness and secondly because these creditors, whose claims the record shows accrued prior to the commencement of the City's undertaking, nevertheless have waited and taken no steps to assert their rights until nearly three years after such commencement, waiting in fact until only a few days before the completion of the work and the turning on of the new water supply before beginning this action.

Such a state of facts brings this case squarely within the application of the equitable principles set forth in *New York City vs. Pine*, above referred to, and we submit presents no situation in which a court of equity can be called upon to enjoin an important public improvement involving the health and comfort of the inhabitants of a large and populous city.

The judgment of the District Court dismissing the bill for want of equity, was right and its judgment should be affirmed.

Respectfully submitted,

SCOTT KENFIELD,
THOS. H. HOGSETT,
Attorneys for the Appellee.

SHELDON H. TOLLES,
JOHN E. MORLEY,
Of Counsel.

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JAN 14 1918
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In the Supreme Court of the United States

OCTOBER TERM, 1917.

No. 105.

JOHN H. SEARS as Trustee,

Appellant,

vs.

THE CITY OF AKRON,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

COPY OF ACT OF OHIO LEGISLATURE KNOWN AS HOUSE BILL No. 357, PASSED MAY 17, 1911.

In the Supreme Court of the United States

OCTOBER TERM, 1917.

No. 105.

JOHN H. SEARS as Trustee,
Appellant,

vs.

THE CITY OF AKRON,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Copy of Act of Ohio Legislature known as House Bill No. 357, passed May 17, 1911, appearing in Volume 102, Laws of Ohio, page 175, being the Act referred to in the Twenty-second paragraph of the Bill of Complaint, record p. 13.

(House Bill No. 357.)

AN ACT

To provide for granting to the city of Akron, Ohio, the right to use and occupy certain waters and lands of the state for waterworks and park purposes.

Be It Enacted by the General Assembly of the State of Ohio:

Section 1. That there is hereby granted to the city of Akron, in the county of Summit, and state of Ohio, the right to divert and use forever for the purpose of supplying water to said city of Akron and the inhabitants thereof, the Tuscarawas river, the big Cuyahoga and little Cuyahoga rivers, and the tributaries thereto, now wholly or partly owned or controlled by the state and used for the purpose of supplying water to the northern division of the Ohio canal, provided, however, and this grant is upon the condition that at no time shall said city use the waters of any such stream, to such extent or in such manner as to diminish or lessen the supply now necessary, to maintain the flow in and through the canal as said canal now exists or as hereafter may become necessary for navigation purposes for an enlarged canal and upon the further condition that the city of Akron shall at all times save the state harmless from all claims arising from such grant and construction thereunder.

Section 2. There is hereby granted to said city of Akron for the waterworks purposes as aforesaid the right to enter in and upon and occupy the lands of the state in said Summit county to develop additional storage either by the construction of new reservoirs or dams, or the enlargement of those already constructed by the state on said rivers, always provided that said construction or enlargement will not result in any interference with or diminution of the supply now necessary for said canal for navigation purposes. And, provided further, that before any such construction of reservoirs or dams, or enlargement of reservoirs or dams now existing shall

be commenced, the plans and specifications therefor be first approved by the chief engineer of the state board of public works. And further provided, that any diversion or impounding on the lands of the state of said Tuscarawas river and the tributaries thereto, by said city of Akron, shall be east of highway known as South Main street extended south. And if the waters of said Tuscarawas river are impounded, used or diverted by said city, the amount of the flow as now or hereafter used and controlled by the state shall not be diminished by such impounding, use or diversion by said city during the months of June, July, August, September, October and November; and at no time shall said city of Akron take or use from any reservoir constructed on the Tuscarawas river an amount of water in excess of an annual average of fifteen million gallons per day, unless with the approval of the board of public works and upon such terms and conditions as may be agreed upon between the said board of public works and said city of Akron, and the chief engineer of the said board of public works shall at all times have access to said property for the purpose of ascertaining the amount of water that is being used by said city of Akron.

The governor shall appoint a commission of three arbitrators to fix the compensation to be paid the state by the city of Akron for any lands or property, exclusive of water, taken by the city of Akron under the provisions of this act.

Provided that any money accruing to the state under this act shall be paid into the state treasury to the credit of the general revenue fund.

Section 3. The governor, upon behalf of the state shall execute and deliver to the city of Akron, Summit county, Ohio, a grant of the right to use forever the waters of such streams, as herein provided, under the provisions herein set forth and for the purposes herein stated.

The attorney general shall prepare the form of said grant.

S. J. VINING,
Speaker of the House of Representatives.

HUGH L. NICHOLS,
President of the Senate.

Passed May 17th, 1911.

This bill was presented to the Governor May 18th, 1911, and was not signed or returned to the house wherein it originated within ten days after being so presented, exclusive of Sundays and the day said bill was presented, and was filed in the office of the Secretary of State June 2nd, 1911.

JOHN W. DEVANNEY,
Veto Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1917.

JOHN H. SEARS, Trustee, *Appellant,* *against* THE CITY OF AKRON, *Appellee.*	No. 105.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

MEMORANDUM OF SUGGESTIONS.

Submitted by The Cuyahoga River Power Company.

The Cuyahoga River Power Company, not a party to this cause, but vitally interested in its result, respectfully asks leave to submit to this Honorable Court certain suggestions which it conceives to be worthy of its very serious consideration in the disposition of this appeal.

The immediately pressing necessity for the utilization of all the available water powers of this country has been most forcefully impressed upon the entire nation by the coal shortage with which practically every section of the country has been recently affected and which has been very acute

throughout the territory in which this company is located. Failure to use these water powers is resulting in a tremendous waste of coal, and in the midst of war we find President Wilson urging Congress to enact legislation that will bring about, on the public lands of the United States, identically the same kind of development which this company proposes to make in Ohio.

The need of protection from storms and floods has likewise impressed itself upon the people of Ohio, as is evidenced by the recent formation of "Conservancy Districts" for the sole purpose of erecting dams and reservoirs in order to so equalize the flow of the rivers and streams of the State as to prevent the violent fluctuations to which those streams are subject.* And so urgent and important are these safeguards from floods that the Secretary of the Treasury has felt compelled to give his sanction to the immediate financing of the Miami Conservancy District to the extent of $15,000,000 in the face of his request that during the continuance of the war the financing of other than government enterprises should be undertaken only when the same are absolutely essential.

The undertaking of this company, described in paragraphs 7-10, 17, 18 of the bill and exhibited upon the "Conservation Map" hereto attached, meets both of these emergencies: (a) its annual output of electric energy will effect a saving of

*The statute is known as the "Conservancy Act of Ohio." It is entitled "An Act to prevent floods, to protect cities, villages, farms and highways from inundation, and to authorize the organization of drainage and conversation districts." It will be found in 104 Ohio Laws 13 and Supp. to Page & Adams' Ohio Gen. Code, Secs. 6828-1 *et seq.* It was declared by the legislature to be an emergency law. The constitutionality of the Act was sustained in *Miami County* v. *Dayton*, 92 Ohio St., 215.

approximately 250,000 tons of coal per year; (b) its reservoirs and dams will so equalize the flow of the Cuyahoga River as to make damage from floods or droughts practically impossible throughout the entire course of the river.

Much has been said about the paramount need of the City of Akron for a water supply. If this company were desirous of or if its plans necessitated the depriving of a community of water, a strong case on that point would be presented. In truth, however, the construction and operation of this company's plant need have no such effect. On the contrary, the amount of water in the Cuyahoga River that could and would be conserved and made available for use by the construction of this company's dams and reservoirs is many times in excess of that which is conserved by the city's reservoir, and there is no reason why the City of Akron might not have a more abundant supply of water under the plans of this company than it could otherwise obtain.

For many years, now, this company has had its plans perfected, but it has been unable to construct its plant because the City of Akron, and other organizations which conceive their own immediate and selfish interests to be more important than the development of the territory as a whole, have not only wilfully and physically interfered with those plans, but, also, made it impracticable and impossible for the company to proceed by their constant assertion (in the courts, in the newspapers, and wherever the subject has been discussed) that the company's charter gives it no rights and that third persons may obstruct and hinder the development at will.

The great, immediate and pressing need of the entire northeastern section of Ohio is the utilization of the now wasted energy of the Cuyahoga River; and that need of the *whole territory* is *paramount* to the need of any fraction or segment of it or of any one community.

Interest rei publicae ut sit finis litium. This company cannot build until its title is established, and no effective development can be provided so long as this company's rights remain undetermined.

To the end, therefore, of permitting immediate provision for the needs of the entire northeastern section of Ohio, we earnestly invite a definitive announcement by this court upon this appeal of the rights which this company obtained by its charter and the other steps and proceedings outlined in the bill.

Respectfully submitted,

WILLIAM Z. DAVIS,
Counsel for The Cuyahoga River Power Company,
Columbus, Ohio.

January, 1918.

MAPS

TOO

LARGE

FOR

FILMING

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Supreme Court of the United States.

OCTOBER TERM, 1917.

JOHN H. SEARS, as Trustee, *Appellant,*

against

THE CITY OF AKRON, *Appellee.*

No. 105.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

APPELLANT'S REPLY BRIEF.

I.

The appellee's brief gives sharp emphasis to the fact that the fundamental and controlling question here presented is whether or not the incorporation of a public utility corporation under the laws of Ohio constitutes a CONTRACT by which the State GRANTS *a right to construct and operate the utility in the place designated in the charter.*

That issue—necessarily involved in the lower Court's ruling that the corporation acquired *no rights whatever*—is clearly and explicitly joined by the appellee's contention that such incorporation is so utterly meaningless and futile that it

may be ignored by third persons and does not even preclude the subsequent incorporation of another company under the same law *in the same place* (see particularly pages 21, 23, 25, 26, 30).

Before discussing that issue, however, it is necessary, in view of the many inaccuracies in the appellee's brief, to set the Court right on the facts.

Under the Ohio Constitution, corporations can be formed only under general laws*, and while there are different provisions relating to the powers of different classes of corporations, such as railroad, telephone, electric, gas, and hydraulic companies, there is *but one general law under which all corporations of all classes must be formed* (*Ohio General Code, Sections 8623 et seq.*). That law provides for the formation of the corporation by the filing of articles of incorporation with the Secretary of State, and the Ohio Supreme Court expressly recognizes the obvious fact that

> "the official services rendered by the Secretary of State (in filing the articles) under this act is *but another description for the granting of franchises by the State.*"
>
> *Ashley* v. *Ryan,* 49 Ohio St., 521.

An important feature of the Ohio law, entirely overlooked by the appellee, is the provision of Section 8625 that

"if the corporation is for a purpose which

*Article XIII provides as follows:

§1. The General Assembly shall pass no special act conferring corporate powers.

§2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.

includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth (*a*) the kind of improvement intended to be constructed, (*b*) its termini and the counties in or through which it or its branches will pass."

In other words, *the articles must at least approximately fix a location,* which means that as to such corporations as railroad and power companies and the like, the filing of the articles is the grant of a franchise, not only to exist as a corporation, but, also, to exist and operate *in a particular place or location.* In a word, it is the right to the location, *i. e., the right to construct and maintain the plant in the place designated in the articles* that we assert and seek to protect in this case.

The appellee is correct in saying, at page 9 of its brief, that the original Articles of Incorporation of the Power Company located its improvement on the Cuyahoga River *below* the point at which the City's dam has been erected, but the appellee is manifestly in error in saying (Brief. p. 10) that there is no averment in the bill that the acts of the appellee would interfere with or materially impair the original project of the Power Company. The error is a part of the fallacy, continually reiterated throughout appellee's statement of the facts, that the original "Roberts-Abbott Plan" adopted by the Power Company in June, 1908, was *abandoned.* That plan was *not* abandoned, but was *amended and supplemented* by the "Von Schon Plan" (Bill, par. 10); and after the amendment of its Articles of Incorporation, the Power Company "duly ratified the *plans*

theretofore adopted by it," *i. e.*, the "Roberts-Abbott Plan" and the "Von Schon Plan" (Bill, par. 13). The Power Company's right, title, and interest in and to the parcels of land selected and located by it for the carrying out of the Roberts-Abbott plan are, furthermore, expressly pledged as security for the bonds represented by appellant, and these parcels are specifically described in the mortgage (Rec., pp. 28-35).

The City's ordinance assumes to appropriate "all the waters of the Cuyahoga River" at the point designated in the ordinance, and such a diversion of all the water at a point *above* the location described in the original Articles of Incorporation of the Power Company *necessarily deprives the Power Company of the flow and fall of the stream which are essential to the development of power.* The acts of the appellee complained of in the bill will, therefore, very manifestly, not only materially impair, but, also, *actually destroy* the project both as originally framed and as supplemented by the Von Schon Plan. Or, as distinctly averred in paragraphs 30 and 31 of the bill, the appellee "has entered and is now trespassing upon the lands and waters in and to and against which the Power Company has acquired rights as hereinabove set forth", and "if the defendant herein divert the waters of the Cuyahoga River in accordance with its announced plan and intention, it will be *impossible for said Power Company to exercise or carry on its corporate purposes or attain its corporate objects or take advantage of or use the parcels of land in and to and against which it has acquired rights* as herein set forth; *the State's grant and command to the Power Company to develop hydro-electric power from the*

*waters of said river will be nullified;** and the property, rights, powers, privileges and franchises so granted to, acquired by, and vested in the Power Company as hereinabove alleged, will be thereby impaired, injured, damaged, destroyed and rendered useless and valueless, to the great and irreparable injury of said Power Company and the persons interested therein" (Rec., p. 19).

In short, the bill clearly shows that the act of the City in taking and diverting the water of the river as provided in its ordinance makes it impossible for the Power Company to develop hydro-electric power and completely nullifies the charter and wrecks the enterprise.

If, therefore, the charter of the Company be a real contract by which there is granted to it *a right to construct, maintain and operate its plant in the place designated in the charter,* there can be no doubt that the ordinance of the City and the proceedings taken thereunder constitute an impairment of the contract and a taking of that right—"a right which, however named, is property" (*Louisville* v. *Cumberland Tel. Co.,* 224 U. S., 649, 661; *Cuyahoga River Power Co.* v. *Akron,* 240 U. S., 462).

The appellee's argument that "no such grant or contract arises from the fact of incorporation" (Brief, pp. 22-31) is substantially a reproduction of the argument which it addressed to this court in the Power Company's case against it (*Cuyahoga River Power Co.* v. *Akron,* 240 U. S., 462); and if the argument had been sound this

*This designation of a charter as "the State's grant and command" to carry on the undertaking to which it relates is taken from the opinion of this court in *Grand Trunk Western Ry. Co.* v. *South Bend,* 227 U. S., 544.

court would have affirmed the dismissal of that case just as it affirmed the dismissal in *Ramapo Water Co.* v. *New York,* 236 U. S., 579. That is to say, in the *Ramapo case* this court affirmed a dismissal for want of jurisdiction because it was of the opinion that the bill disclosed no substantial contract or property right, and its action in *reversing* the dismissal of the Power Company's case against Akron necessarily constitutes an adjudication by this court that the Power Company has a contract or property right which cannot be impaired or taken without compensation. We submit that the decision in that case is conclusive here.*

It may not be amiss, however, to point out the errors which pervade the argument now made against us:

1. Stress is laid upon the reserved right of repeal. The conclusive and sufficient answer to this is that the repeal must be *by the General Assembly* and THERE HAS BEEN NO REPEAL IN THIS CASE. The charter of the Power Company and the laws under which it was organized still remain in full force and effect.

2. The appellee's view as to the construction and effect of the legislation in question is at once so amazing and of such grave consequences, if sustained, that we reproduce its substance in lettered sentences in order to answer it specifically:

(*a*) The appellee says:

> "These laws authorize the formation of such corporations *but make no direct or defi-*

*The decree now under review was made and this appeal was taken and docketed in this court *before* the decision in *Cuyahoga River Power Co.* v. *Akron,* 240 U. S., 462, was announced.

nite provision as to any specific locality in which they are to operate" (Brief, pp. 25, 26).

The truth is precisely the contrary. Section 8625 of the Ohio General Code expressly provides:

> "If the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth (*a*) the kind of improvement intended to be constructed, (*b*) its termini and the counties in or through which it or its branches will pass."

And in *Callender* v. *Painesville, &c., R. R. Co.*, 11 Ohio St., 424, it was expressly ruled that that requirement is "*for the purpose of avoiding conflict in prior and subsequent grants of corporate powers.*" The language of the court in that case was as follows:

> "Indeed it will be found, I apprehend, that the rule has been in our past legislation, to have the point of the termini somewhat indefinite in the charter, and that it has only become determinate by an actual location. Nor can I perceive that the language of the statute under consideration intended to change the rule in that regard. It was found convenient, and often necessary, under our special legislation, both for the limitation of the powers to be granted in the charter, AND FOR THE PURPOSE OF AVOIDING CONFLICT IN PRIOR AND SUBSEQUENT GRANTS OF CORPORATE POWERS FOR LIKE PURPOSES, to have reasonable certainty expressed in the charter. *For like reasons, and to secure the same objects, the certificate is required to express with like cer-*

tainty, as was before expressed in the charter, as well the place of the termini and the counties through which a license to construct is asked, as the name of the company. *And the certificate when thus made, acknowledged and certified, and recorded by the Secretary of the State, by force of the statute, becomes to the company,* AND TO THIRD PERSONS, *as authoritative a description and license to locate the road in a reasonable compliance with such description, as would the same language expressed in a special act or charter, under our former constitution.''*

(*b*) The appellee says:

"There is no requirement that, having been formed, they shall perform any public service whatever. They are free to carry out the purposes named in their articles, or such part thereof as they may deem advantageous, as they see fit" (Brief, p. 26).

The truth, as declared by this court and the Supreme Court of Ohio, is just the reverse. In *New York Electric Lines Co.* v. *Empire City Subway,* 235 U. S., 179, 193, this court expressed the long-established rule as follows:

"Grants like the one under consideration are not *nude pacts,* but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See *The Binghamton Bridge,* 3 Wall., 51, 74; *Pearsall* v. *Great Northern Railway,* 161 U. S., 646, 663, 667. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and

during the course of performance as contemplated, as well as after that performance."

In *Adena R. R. Co.* v. *Public Service Commission*, 92 Ohio St., 1, the Supreme Court of Ohio affirmed an order of the Commission requiring a railroad company which had been *organized under the general laws of the State of Ohio* to provide certain passenger service and facilities, although the company had actually held itself out as a carrier of freight only. In so holding the court said:

"It was thus organized under the general laws of the state, and assumed all the functions and became saddled with all the obligations of a common carrier of freight and passengers. By its charter it obtained the special powers and privileges granted railroad corporations, including the right of eminent domain. Having the undoubted power, under its charter, to perform the functions of a common carrier of passengers, it became amenable to the state's control in relation to that specific duty. Its obligations are mutual and correlative. *Since the railroad company under its franchise could insist upon its right to carry passengers, the state could also insist upon the performance of that duty by the carrier within reasonable limits.*

* * * * * * *

"BY ITS INCORPORATION, UNDER THE GENERAL LAWS, THE CORPORATION ASSUMED THE PERFORMANCE OF DUTIES FOR THE BENEFIT OF THE PUBLIC GENERALLY AS A COMMON CARRIER. *Scofield* v. *The L. S. & M. S. Ry. Co.*, 43 Ohio St., 571; *State* v. *The Hazelton & Leetonia Ry. Co.*, 40 Ohio St., 504; 4 Elliott on Railroads (2 ed.), section 1392.

"That it has held itself out to the public,

> for a period of time, as a carrier of freight only, does not impinge upon *the right of the state to compel the exercise of its franchise,* if that right existed at the time of the grant and was not affected by subsequent legislation."

In *Hocking Valley Ry. Co.* v. *Public Utilities Commission,* 92 Ohio St., 9, the Supreme Court of Ohio again affirmed an order requiring the Railway Company to establish and furnish certain passenger service. In so holding, the Court said:

> "It is not shown that there is any special franchise provision or any contract by which the defendant expressly agreed to render the service in question. Therefore, the order of the commission must find its validity, if at all, by reason of the fact that the defendant is *a public utility, incorporated and organized under the laws of the state,* and that while exercising the rights and privileges accruing to it as such, it has by its acts and conduct created the situation found by the commission to exist; and that from this situation a duty is imposed upon it which it cannot disregard in the absence of such a showing on its part as above indicated.
>
> "It is well established that *the benefits which result to the public constitute the consideration for the grant* by the state of the franchises, rights and privileges held and exercised by a railroad company, and that *their acceptance by the company imposes on it the obligation* to operate the railroad which it was incorporated to construct, when constructed, and of doing so in the manner and for the purposes contemplated in its charter. One of the obligations thus imposed is

> to so operate its trains that they will reasonably serve the needs of the public."

The State Court has also, as recently as May, 1917, approved this statement of the law:

> "It is, of course, well-settled law that a railroad may not render itself incapable of performing its duties to the public or *absolve itself from those obligations* without the consent of the state.
>
> *Kanawha & M. Ry. Co.* v. *Public Utilities Com.*, 117 N. E., 353, 357.

It is thus conclusively settled that by incorporation under the general laws of Ohio a corporation *assumes the obligation of performing the undertaking to which the incorporation relates.* The Power Company was incorporated under the same general law as that under which railroads are incorporated, and the decisions cited are hence controlling.

(*c*) The appellee says:

> "The filing of articles of incorporation by one set of incorporators would not prevent the incorporation of another company with like purposes, nor would the designation of certain termini or the specification of a certain river in the articles of incorporation of one company preclude the organization thereafter of another company naming the same river for its field of operation" (Brief, p. 26).

Of course the filing of articles by one set of incorporators would not prevent the incorporation

of another similar company *in a different location.* But to say that the designation of a location in the articles of one company does not preclude the organization of another company to operate *in that same place,* is to render meaningless the express provision §8625 of the Ohio Code requiring the articles to state the location, and would contradict the ruling made in *Callender* v. *Painesville &c. R. R. Co., supra,* in which it was said that *the very object of requiring a statement of the location in the articles is for the purpose of avoiding conflict in prior and subsequent grants.*

Indeed, the contention here advanced that a grant of the right to one place to one person does not preclude a second grant of the same right to another person is wholly inconsistent with the fundamental proposition upon which the *Dartmouth College Case* was decided, viz., "a grant, *in its own nature,* amounts to an extinguishment of the right of the grantor and implies a contract not to re-assert the right." The legislature having granted the right to one place to A cannot thereafter grant it to B. To accede to the contention of the appellee, therefore, would in very truth overrule the *Dartmouth College Case* in its entirety.

The doctrine for which the appellee here contends would likewise lead to a manifest practical absurdity. If one set of incorporators may file articles for one location on one day and another set may file articles for the same location on another day, then the first set might refile additional articles on the third day, and there would thus be created interminable confusion, with the result that neither corporation could in any way protect its rights or proceed with its operations.

A decision sustaining the appellee's position would sound the death knell of corporate enterprise throughout this country.

(*d*) The appellee says:

> "The incorporators, to give a necessary definiteness to its purposes for indicating what shall be *intra vires* and *ultra vires*, recite in general language where the corporation is to conduct its operations, but these purposes may be enlarged or diminished or wholly unperformed" (Brief, p. 26).

As already pointed out, however, the statutory requirement that the articles of incorporation specify the location is *not* for the mere purpose of defining or limiting corporate powers. It is "for the purpose of avoiding conflict in prior and subsequent grants of corporate powers for like purposes" (*Callender* v. *Painesville &c. R. R. Co., supra.*) As also already pointed out, these purposes may *not* be left "wholly unperformed," for there is an obligation resting upon the company to perform the public service to which the undertaking relates (*N. Y. Elec. Lines* v. *Empire City Subway, supra; Adena R. R. Co.* v. *Public Service Commission, supra; Hocking Valley Ry. Co.* v. *Public Utilities Commission, supra*).

(*e*) The appellee says:

> "It seems to us impossible to read into the general language of this statute any intention of conferring any exclusive rights upon corporations which may be organized under it and there certainly cannot be read into this general law the intention to confer

> any such exclusive rights of the extravagant character claimed by appellant" (Brief, pp. 26, 27).

If the legislature did not intend to confer upon corporations organized under these statutes *a right to construct and maintain a plant in the place designated in the articles*—a right that cannot exist unless there be included in it the right to exclude all other persons from the same place —what did it intend? Borrowing the language of this court in *New York Electric Lines Co.* v. *Empire City Subway, supra,* the statutes under which the incorporation was effected were

> "intended to afford the basis of enterprise with reciprocal advantages, *and it would be virtually impossible to fulfill the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred,* if, *in the initial stages of the enterprise,* when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the (rights and powers conferred) should be subject to revocation at any time by the authorities—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, *but because as yet no contract whatever had been made and there was nothing but a license which might be withdrawn at pleasure.*"

The sweeping and amazing contention in the present case is that the rights conferred by incorporation *do not even amount to a revocable license.* The appellee, like the court below, goes far beyond that position and asserts that, even

prior to any repeal or revocation by the Legislature, the incorporation is so utterly futile and abortive that it may be ignored by any and every third person—as the City has in fact ignored the Power Company. As put at page 26 of its brief, the incorporation, according to the view of the appellee, does not even "preclude the organization thereafter of another company naming the same river for its field of operations."

The practical result of such a doctrine is sufficient to demonstrate its unsoundness. The manifest intent of the legislature in enacting Section 10,128 of the General Code was to provide for the development of hydro-electric power from the waters of the rivers of the state through the instrumentality of incorporated companies, which, as shown by the eloquent language of Mr. Justice Holmes in *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S., 30, 32, is a great and beneficent public purpose. In order to obtain the rich benefits of such development the legislature conferred upon companies organized for that purpose the right to enter upon, survey, and appropriate the lands and waters necessary to construct and operate the plant (*Ohio Gen. Code,* Sec. 10128). Could any effective development be secured if, after the incorporation of one company for the development of one river, another set of incorporators might immediately procure the organization of another company "naming the same river for its field of operation"? Manifestly not. Such a construction of the legislation would effectively prevent any development whatever and set the legislative purpose at naught. Public grants, it is true, are to be construed strictly in favor of the public, and ambiguities are to be resolved against

the grantee, but *"this principle of construction does not deny to public offers* A FAIR AND REASONABLE INTERPRETATION, *or justify the withholding of that which it satisfactorily appears the grant was intended to convey"* (*Russell v. Sebastian*, 233 U. S., 195, 205). The only "fair and reasonable interpretation" of the legislation of Ohio upon this subject is that a company organized for the purpose named in the statute should be endowed with the rights and powers necessary to accomplish the purpose. And to that end it must be held that the incorporation gives to the company THE RIGHT TO CONSTRUCT AND OPERATE ITS PLANT IN THE PLACE DESIGNATED IN THE ARTICLES. That is the claim we assert in this case. Certainly it cannot be deemed an extravagant one.

We do not claim that the Power Company's charter protects it from *mere competition*. That was the ground of decision in *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, which forms the basis of the appellee's quotation from *Pearsall* v. *Great Northern Ry.*, 161 U. S., 646, at page 27 of its brief. In the sense, therefore, that other hydro-electric corporations may be organized under the act under which the Power Company's incorporation was effected, the Power Company's franchise, we freely concede, is not exclusive. But in the sense that no other corporation may obtain the right to locate *in the same place* as the Power Company, its franchise is *obviously* and *necessarily* exclusive.

In the *Charles River Bridge case*, Chief Justice TANEY was careful to point out (p. 549):

> "The relative position of the Warren bridge has already been described. *It does*

> *not interrupt the passage over the Charles River bridge, nor make the way to it, or from it, less convenient.* None of the faculties or franchises granted to that corporation have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property, enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired."

It was *not even contended in that case that the Legislature might have authorized the construction of another bridge in the identical place occupied by the Charles River Bridge.* On the contrary, as pointed out by Mr. Justice STORY (pp. 603, 604):

> "*Every grant of a franchise is,* SO FAR AS THAT GRANT EXTENDS, *necessarily exclusive;* and cannot be resumed or interfered with. All the learned judges in the state court [whose judgment was affirmed by this court] admitted that the franchise of Charles River bridge, whatever it be, could not be resumed or interfered with. The legislature could not recall its grant, or destroy it. It is a contract, whose obligation cannot be constitutionally impaired. In this respect, it does not differ from a grant of lands. *In each case, the particular land, or the particular franchise, is withdrawn from the legislative operation.* The identical land, or the identical franchise, cannot be regranted, or avoided by a new grant."

The distinction is well brought out in *Matter of Union Ferry Co.*, 98 N. Y., 139, 153-154, in

which it was contended that a grant was in conflict with the provision of the Constitution of the State that the Legislature should not pass any private or local bill granting any "exclusive" franchise, because the "designation of the particular piece of property to be condemned for the purposes of the ferry renders the grant of the privilege or franchise exclusive, inasmuch as no one but the grantee of the power can take the same property." The Court held, however, that this was not "the nature of the exclusiveness contemplated by the Constitution." It said (p. 154):

> "Where a toll-bridge is authorized to be erected at a particular locality, the right to that particular bridge is necessarily exclusive. *So of all lands acquired by a railroad company for depots, car yards, etc., their right to enjoy those lands is exclusive.* The right of the owner of upland to fill out into waters of the State in front of his land is exclusive in respect to the particular property involved, though a similar right may be conferred upon every person owning lands similarly situated."

The distinction was also made the basis of decision by the Supreme Court of Ohio in *Hamilton G. & C. Traction Co.* v. *Hamilton & L. Electric Transit Co.*, 69 Ohio State, 402, which is cited at page 21 of our first brief. In that case the grantee of a franchise to construct, maintain and operate a street railroad upon certain streets in the City of Hamilton was successful in enjoining another company from operating a street railroad in the same streets (the tracks of the second company being laid in such manner as to straddle

the tracks of the first company) under a second grant from the City. The Court expressly stated that by making the grant to the first company the City *did not exhaust its power or deprive itself of the right to make additional grants for like purposes "in and to the unoccupied portions of the street";* but it held that so long as the first grant remained in force the City *could not make a second grant to another company of the right to have and occupy "precisely the same ground or right of way first granted."* It said:

> "To permit this would be to sanction and allow the impairment of the obligation of an existing contract by subsequent municipal legislation or grant. This may not rightfully be done."

The exclusiveness of the Power Company's franchise (in the sense that it may not be impaired by a third person's use of *the same identical location*) is likewise established by the "conflicting location cases" cited on pages 31-34 of our first brief. The fundamental principle of those cases is that when the so-called "floating" grant of a franchise to construct and operate a railroad or other utility between named termini has been *made specific by the adoption of a particular location,* the franchise necessarily becomes exclusive in the sense that, although other railroad companies may be subsequently incorporated to build other railroads, they cannot take or interfere with the location adopted by the first company. As said in one of the cases:

> "That the plaintiff's franchise is exclusive so far as the right to construct a railroad on the line which has been adopted must be

conceded, as another road cannot be constructed and operated on the same location; although the statute has not declared in express terms that the privilege is an exclusive one, it would lead to needless contention and disastrous disturbances to hold otherwise and give the statute a different construction."

Rochester H. & L. Co. v. *N. Y. L. E. & W. R. R. Co.*, 44 Hun, 206; 110 N. Y., 128.

(*f*) The appellee says:

"Not only does the law contemplate the possibility of more than one company being incorporated to operate in a particular territory, but it must also be construed with reference to the paramount rights of the state in the waters of the state, its rights as trustee for the public to make use of the waters for public needs and the then existing legislation specifically authorizing municipalities to construct waterworks and appropriate water for the use of their inhabitants" (Brief, p. 27).

In answer to this we say:

First, the law does *not* contemplate the possibility of more than one company being incorporated to operate in a particular territory. On the contrary, it requires the articles to state the location *for the very purpose of avoiding conflict in prior and subsequent grants of corporate powers for like purpose* (*Callender* v. *Painesville &c. R. R. Co.*, *supra*), and, for reasons just pointed out, such a construction of the charter, as said by this Court

in *Louisville* v. *Cumberland Tel. Co.*, 224 U. S., 649,

> "cannot be supported either from a practical or technical standpoint."

Second, apart from its sovereign power of eminent domain, which, of course, requires the payment of compensation for property taken under it, the State of Ohio has no "paramount rights" as "trustee for the public" in the waters of a non-navigable stream like the Cuyahoga River. The case of *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commission*, 168 U. S., 349, upon which the appellee relies, RELATED TO A NAVIGABLE STREAM. This distinction, as bearing upon the rights of the State as trustee for the public, is obvious and vital; and by reason of it the case cited is wholly inapplicable. Moreover, that case arose in Minnesota where it is held that the water of public streams may be taken for a public water supply without compensation (*Minneapolis Mill Co.* v. *Board of Water Commrs.*, 56 Minn., 485), and in rendering its decision in the case cited this court followed the local law. In Ohio, the settled doctrine is that upon non-navigable streams like the Cuyahoga River the bed of the stream is owned by the abutting landowners (*Day* v. *Railroad Co.*, 44 Ohio St., 406*) and their riparian rights are private property which cannot be taken or interfered with, even by State authority, without the payment of just compensation (*Mansfield* v. *Balliett*, 65 Ohio St., 451). In short, then, the State of Ohio has no "paramount rights" in the Cuyahoga River which it can take without

*This case related specifically to the Cuyahoga River itself.

the payment of compensation; and hence the Power Company did not take its charter subject to any such rights.

Third. It is quite true that the Power Company took its charter subject to "*existing legislation* (if any) specifically authorizing municipalities to construct water works and appropriate water for the use of its inhabitants." But this is a long way from showing that the charter is not a contract or that it does not grant the rights claimed in this case. On the contrary, it simply shows that the Power Company took its charter subject to any legitimate exercise of the power of eminent domain, which we do not deny. If the City of Akron, as claimed in its brief, has statutory authority to appropriate property for water supply purposes, it can appropriate the Power Company's charter and franchises and everything else it possesses (*Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S., 685; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S., 390). BUT IT CAN DO SO ONLY BY PAYING JUST COMPENSATION (Cases just cited). Its refusal to pay this compensation is one of the complaints made in this case.

Indeed, a fallacy continually reiterated throughout the appellee's brief is the failure to distinguish between the right of the State to *appropriate* contracts and charters and franchises in the exercise of the power of eminent domain and the right of the State or municipality to *confiscate* them by taking or destroying them without the payment of compensation.

3. The third branch of the appellee's argument is its statement that "the numerous cases cited by

appellant in support of its theory that the fact of incorporation constituted an exclusive grant to make use of the Cuyahoga River are wholly inapplicable" (Brief, pp. 29, 30).

Bearing in mind that we never asserted that the grant is "exclusive" save in the sense that the right of the Power Company *to construct and maintain its plant in the place designated in the charter* necessarily implies a right to exclude other persons *from that place*—which is the same kind of exclusiveness that necessarily attends every grant for a public purpose and is nothing more than the assertion of the maxim that two bodies cannot occupy the same space at the same time—we would have expected the appellee to follow the above-quoted statement with some attempt to distinguish the authorities cited at pages 10 to 30 of our first brief. Let us see how it has done so.

(*a*) The only case specifically mentioned by the appellee in this connection is *Piqua Branch State Bank* v. *Knoop*, 16 How., 369, and of that case its only remark is that it was decided before the adoption of the present constitution of Ohio and at a time when there was no reservation of the right to alter or repeal. Obviously that is no reason why the decision is inapplicable where, as in the case at bar, the reserved right to alter or repeal *has not been exercised.* That decision, therefore, still stands as an explicit and binding pronouncement by this court that *incorporation by filing articles of incorporation under the laws of Ohio constitutes a contract which embraces within its scope "every valuable privilege given by the charter" which conduced to the acceptance of the grant and to the organization of the company.*

(*b*) Many of the authorities cited in our brief are attempted to be summarily disposed of by the appellee with the remark that they "have to do with street railroad or other similar franchises granted by municipal corporations, which municipalities have subsequently undertaken to revoke or otherwise impair" (Brief, p. 30).

In this class fall such cases as

(1) *Louisville* v. *Cumberland Telephone Co.*, 224 U. S., 649, in which a city ordinance conferring a street franchise for a telephone company was held to constitute a contract and property right and in which this court said:

> "In considering the duration of such a franchise, it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. *To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use.* For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city and the utility and value of the entire plant be thereby destroyed. *Such a construction of the charter cannot be supported, either from a practical or technical standpoint.*"

(2) *Grand Trunk Western Ry.* v. *City of South Bend*, 227 U. S., 544, in which the City attempted to prevent the laying of a double track under an

ordinance, passed many years before, giving the company the right to lay such track, and in which this court said:

> "It is said, however, that even if the city could not prevent the use of the rails already laid, it could repeal so much of the ordinance as related to that part of the street on which the double track had not been actually built. But this was not a grant of several distinct and separate franchises, where the acceptance and use of one did not necessarily execute the contract as to others not connected with the main object of the ordinance and not at the time directly within the contemplation of the parties. *Pearsall* v. *Great Northern R. R.*, 161 U. S., 646, 673. This franchise was single and specific, and *when accepted and acted upon became binding—not foot by foot, as the rails were laid—but as an entirety.* * * *
>
> "The ordinance passed in pursuance of the Indiana statute was an entirety. *When accepted it became binding in its entirety.* If the city has the right to repeal the specific provisions of the contract, it has the like right to repeal the more general grant to lay a single track. If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion of traffic, *the State's grant and command* to operate a continuous road could be nullified by municipal action, to the destruction of great highways of commerce, similar in their nature to the street itself. Such consequences, though improbable, are rendered impossible by the provision of the Constitution of the United

States prohibiting the impairment of the obligation of a contract by legislation of a State, whether acting through a General Assembly or a municipality exercising delegated legislative power."

(3) *Boise Water Co.* v. *Boise City*, 230 U. S., 85, 90, in which this court said:

> "The right which is acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the streets is a substantial property right. It has all of the attributes of property. It is assignable and will pass under a mortgage sale of the property and franchises of the company which owned it. Dillon's Mun. Corp., 5th Ed., Sec. 1265; *Detroit* v. *Detroit Street Railway*, 184 U. S., 368, 395, 396; *Louisville* v. *Cumberland Tel. & Tel. Co.*, 224 U. S., 649, 661; *Detroit Railway Co.* v. *City of Detroit*, 64 Fed. Rep., 628. The grant was made in contemplation of the investment of large capital in the construction of a system of water works for the permanent supply of the city with water. *The presumption is that no such enterprise would have been entered upon if the street easement was subject to immediate revocation.*"

(4) *New York Electric Lines* v. *Empire City Subway*, 235 U. S., 179, 193, 194, in which the court said that such grants "are made and received with the understanding that the recipient is *protected by a contractual right from the moment the grant is accepted*" and that "the grant becomes effective *when made and accepted* in accordance with statute" and "*the grantee is thus protected in starting the enterprise.*"

(5) *Hamilton G. & C. Traction Co.* v. *Hamilton & L. Electric Transit Co.*, 69 Ohio St., 402, in which the Supreme Court of Ohio held that a second grant of the right to lay tracks *in the place covered by the first grant* was void because the first grant constituted a contract and vested property right.

Is it correct to say that the principles of those cases are "inapplicable" or that they do not sustain the proposition that incorporation under a statute that indisputably gives the right to enter upon, survey and appropriate the lands necessary for the construction and maintenance of a hydro-electric plant upon a named portion of a named river constitutes a contract-grant of the right to construct and operate the plant in the place named in the charter—which right is "exclusive" *ex rei necessitate* because the right cannot exist if someone else has an equal right to do the same thing in the same place? What distinction in principle can be drawn between the cases just mentioned and the case at bar? "Street railroad or other similar franchises granted by municipal corporations" have vitality and effect and constitute contracts and property rights *only because granted pursuant to delegated legislative authority.* Can it be that a right conferred by an agent of the legislature is of greater dignity, worth or vitality than a right conferred by the legislature itself? That is the only theory upon which the appellee's attempted distinction of the cases above mentioned can be sustained.

The truth is that the city ordinance cases are based upon prior decisions with respect to direct legislative grants, and when a street franchise granted by a municipality has been made and ac-

cepted it is *"thereafter held, not from the City, but from the State"* (*Grand Trunk W. Ry. Co.* v. *South Bend,* 227 U. S., 544, 555).

In the case at bar, precisely as in the cases just cited, the grant was made "in contemplation of the investment of large capital" which manifestly no one would be willing to make if the grant could be destroyed with impunity by such acts as the appellee has taken in this case or by the incorporation of another company to operate in the same place. Consequently the construction of the grant now insisted upon by the appellee "cannot be supported either from a practical or technical standpoint."

(*c*) Other cases cited in our first brief are attempted to be brushed aside by the appellee with the remark that they "have to do with the location of rights of way by rival railroad companies" (Brief, p. 30). But obviously there can be no distinction in principle between a grant to a railroad and a grant to a power company. If, as is indisputably true, the filing of articles of incorporation of a railroad company gives the right to construct and maintain a railroad in the location designated in the articles, then the filing of articles of incorporation of a power company must give a like right to construct and operate a power plant in the location designated in those articles.

(*d*) Finally, the appellee says:

> "in no case do we find the proposition announced that the mere act of incorporation of a water power company under general law for the purpose of building a dam on a particular river confers any exclusive right to use the waters of the river so as to prevent

its use by the state or by a municipality under authority of the state, or even to preclude the incorporation of another similar company under the same general law, which might locate on the same stream" (Brief, p. 30).

It is entirely immaterial whether the decided cases relate to water power companies or to railroads, canals, street railroads, or gas, electric, or telephone companies, or any other public utility. One principle applies to all; and if it be the law that the act of incorporation of *any* public utility company under general law for the purpose of carrying on a public undertaking in a specified place confers the right to construct and maintain the improvement in that place, the same law must be applicable here regardless of whether the application of the principle to a water power company has ever been questioned or not.

Would the decision in *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & Johns., 1 (p. 16 of our first brief), have been different if it had related to a power company instead of a canal company? Would this court have refrained from saying that "one obligation assumed by the State (by the incorporation) was that it would not prevent the company from so constructing and operating the road" if the case of *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S., 362, 392 (p. 17 of our first Brief) had involved a power company instead of a railroad? Would the decision of this court in *Monongahela Nav. Co.* v. *United States*, 148 U. S., 312, have been different if it had involved a power company instead of a bridge company? Would *New Orleans Gas Co.*

v. *Louisiana Light Co.*, 115 U. S., 650; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S., 674, and *St. Tammany Water Works Co.* v. *New Orleans Water Works Co.*, 120 U. S., 64, have been differently decided if they had involved power companies instead of light and water companies? Would the Supreme Court of Ohio have rendered a different decision in the case of *Hamilton G. & C. Traction Co.* v. *Hamilton & L. Electric Transit Co.*, 69 Ohio St., 602 (p. 21 of our first Brief), if it had involved *a direct grant by the Legislature of the right to construct and maintain a hydro-electric plant in a named portion of a named river* instead of a delegated legislative grant of the right to occupy a public street with a street railroad? If the case of *Boise Water Co.* v. *Boise City*, 230 U. S., 85, 90, had involved a *statute* instead of an *ordinance*, would not this court still have used the following language, changing the word "ordinance" to "statute":

> "The right which is acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the streets is a substantial property right?"

And if the case had involved a statute granting to a power company the right to construct and maintain a hydro-electric plant in a named portion of a named river, would it not still have said that "such right is a substantial property right."

Lastly, if the case of *Long Sault Development Co.* v. *Call*, 242 U. S., 272, 276, had involved a *general law* authorizing any corporation formed under its authority "to construct, maintain and operate dams, canals, reservoirs and appurte-

nances necessary or useful for the purpose of developing water power and electrical energy" at such point or points of a specified portion of a named river as may be selected by the company, instead of a *special act* of the legislature of the same kind, would not Mr. Justice CLARKE still have said, as he did say, in that case:

> "The grants of the Act of 1907 are such that, if it was a valid law, upon their being accepted, they constitute property or contract rights, of which the plaintiff could not be deprived, and which could not be impaired by subsequent legislation"?

We ask no more in the case at bar than that this court adhere to that statement. The act from which the Long Sault Development Co. derived its rights is identical in purpose and effect and almost identical in language with the Ohio legislation involved in this case. That is to say, the Ohio laws under which the Power Company was formed indisputably grant a right to construct, maintain and operate a hydro-electric plant on a named portion of a named river, and, in terms, confer the right to enter upon, survey and appropriate the lands necessary for that purpose (Ohio Gen. Code, Sec. 10128). What distinction between that case and this can be suggested under which it can now be asserted that the grants of the Ohio laws, having been adjudged to be valid and having been duly accepted by the Power Company in the manner provided in the statute, do *not* constitute "property or contract rights of which the plaintiff could not be deprived and which could not be impaired by subsequent legislation"?

We respectfully insist that the above quoted portion of the opinion of Mr. Justice CLARKE in the *Long Sault case* (which, upon that point at least, received the concurrence of every member of this court) is conclusive in our favor. There, as here, we have a statute authorizing a company to construct and maintain a hydro-electric plant at such point on a named river as the company may select. As the grant in that case was such that if the law had been valid it would have constituted a contract and property right, how can it be said that the same kind of grant in this case (the validity of the law being unquestioned and unquestionable) does *not* constitute a contract or property right?

Instead of the cases cited in our first Brief being "wholly inapplicable," as asserted by the appellee, they are *identical in principle*, and the one last mentioned is *substantially identical on its facts.*

II.

The appellee refers to our contention with respect to the effect of the Power Company's adoption of plans, surveys and descriptions as being a "shifting of position (Brief, p. 31).

The contention on this point is not a *shift*, but a *development.*

Where the *place* or *location* of the proposed improvement is *specifically* designated in the grant itself, *i. e.*, where the articles of incorporation *definitely fix* the location, no adoption of plans, surveys or descriptions is essential (see *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio*

R. R. Co., 4 Gill & Johns., 1, and *Morris & Essex R. R. Co.* v. *Blair*, 9 N. J. Eq., 635, cited at pages 16, 17 of our first brief). The *original* articles of the Power Company do *definitely fix* the location of its improvement as beginning at the confluence of the Big Cuyahoga River and the Little Cuyahoga River and extending along the Big Cuyahoga River across the line between Summit and Portage Counties (Bill, par. 3). As to that location, therefore, the mere act of incorporation is sufficient to entitle the Power Company to hold that location as against all third persons.*

Where, however, the charter itself does *not* definitely fix the *place* or *location*, it must be, and is, made definite and specific *by the corporation's own adoption of its surveys and descriptions* (see cases cited at pages 31 *et seq.* of our first brief). The Power Company's *amended* articles do not make a specific location, like the original articles, but merely state the termini and the counties through which the improvement would pass (Bill, par. 12), which, of course, was in accordance with the authority conferred by Section 8625 of the Ohio General Code. As to the grant contained in these amended articles it is, therefore, essential to show that the location had been made definite and specific by its adoption of its plans, surveys and descriptions; and such definite location is shown in paragraph "Thirteenth" of the Bill, which reads as follows:

"After the amendment of its said articles

*It should be noted, however, that as a matter of fact the Power Company did adopt specific surveys and descriptions of all parcels of land needed for the plant provided for in the original articles, and these descriptions are set forth in full in the mortgage annexed to the bill. (See Par. 7th of the Bill and Clause III of the Mortgage at Rec. pp. 3, 4, 28-32).

of incorporation said Power Company by appropriate corporate resolutions duly ratified the plans theretofore adopted by it; and at various times and from time to time said company *duly located and adopted specific surveys and descriptions of each and every parcel of land necessary to be acquired and utilized in the construction and erection of its said improvements and in executing and carrying out its said plans.* Said descriptions of said parcels of land were all *duly adopted on or before the 7th day of May, 1912, and on said date there was, and ever since has been and there now is upon the records of said company duly adopted descriptions of each and every parcel of land necessary to be acquired and utilized for the purposes aforesaid.* Said parcels of land, of which said company has duly adopted descriptions as aforesaid, are *situated in, along, upon and adjacent to the Cuyahoga River from a point above Burton Station in Geauga County to a point below the Village of Vaughn in Cuyahoga County*, and have, as appurtenant thereto, all the riparian rights accruing to riparian owners under the laws of the State of Ohio."

It is well settled that under articles of incorporation which fix merely the terminal points the corporation has the power to locate its improvement between those points, and a discretion as to the exact line to be adopted.

Callender v. *Painesville &c. R. R. Co.*, 11 Ohio St., 424;

Walker v. *Mad River R. R. Co.*, 8 Ohio, 38.

And our position here is that, the route or place having been definitely fixed and located as averred in paragraph Thirteenth of the Bill, the right of the Power Company to hold that place is as complete as if the place had been specifically described in a legislative grant. In other words, the location having been made pursuant to State authority delegated to the Company it has the force of State action, and, as was said by this court in *Denver & Rio Grande R. R. Co. v. Arizona & Col. R. R. Co.*, 233 U. S., 601, *"the company is entitled to protection as soon as its final location is complete."* The principle thus approved by this court in that case is one universally recognized, as is shown by the citations on pages 31-34 of our first Brief.

We fully recognize that under the statutes of Ohio no eminent domain corporation acquires the private owner's title to the soil until his compensation has been assessed and paid. (*State ex rel.* v. *Cincinnati & Ind. R. R. Co.*, 17 Ohio St., 103, cited by the Court below and also cited by the appellee at page 33 of its Brief.) *We are not claiming the title of the private owner.* The doctrine for which we contend is that which was stated by Judge SHIRAS in *Sioux, &c., Co.* v. *Chicago, &c., Co.*, 27 Fed., 770, as follows:

> *"The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right, and better equity.* The right to the use of the right of way is a public, not a private, right. IT IS, IN FACT, A GRANT FROM THE STATE, and *although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have*

> *the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement.* The owner cannot, by conveying the right of way to A, thereby prevent the State from granting the right to B. *All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the State has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest,* and also what shall constitute an abandonment of such right."

See, also, particularly, the quotation from *Williamsport &c. R. R. Co. v. Philadelphia & Erie R. R. Co.*, 141 Pa. St., 407, at pages 5 and 6 of our first brief.

The contention of the appellee and the ruling of the Court below are that this doctrine that priority of location gives priority of right *does not prevail in Ohio.* In support of that position there is cited the decision of the Court of Common Pleas in *Columbus Terminal & Belt Co.* v. *Toledo & Ohio Central Ry. Co.*, 32 Ohio Weekly Law Bulletin, 186, which is said to express the "settled law of Ohio."

Our first brief has sufficiently demonstrated, we think, that that decision is very far from being the settled law of Ohio. In addition to that, however, that decision is directly opposed by the decision of the Court of Common Pleas of Jackson County, Ohio, in *Ohio Southern R. R. Co.* v. *Cincinnati, Hamilton & Dayton R. R. Co.*, an unreported case the pleadings and judgment in which we herewith furnish to the court. In that case, the Ohio Southern Railroad Company sought to enjoin the Cin-

cinnati, Hamilton & Dayton R. R. Co. "from disturbing *the survey, location, and designating marks* thereon and from laying its tracks and constructing a railroad over" certain premises described in its petition, *which premises the plaintiff company did not own by virtue of any purchase or condemnation proceeding.* The petition alleged that the defendant company, "having actual knowledge of *plaintiff's location and survey*" and "for the sole purpose of hindering plaintiff in its attempt to condemn," had obtained possession of the land in question and was engaged in constructing a switch thereon "upon and over *plaintiff's location.*" The defendant answered that the owner of the land in question had conveyed the same to the defendant by good and sufficient warranty deed and that defendant had paid such owner the full consideration therefor. The plaintiff replied that if the defendant had purchased the land in question it had done so "well knowing that plaintiff had *located its line* as aforesaid." Upon these pleadings the court found "the facts set forth in the petition of plaintiff to be true," and thereupon perpetually enjoined the defendant "from disturbing *the survey, location, and designating marks thereon* and from laying its tracks and constructing a railroad upon the premises named in the petition of plaintiff." It appears from the Certificate of the Clerk attached to the pleadings and judgment that an appeal was taken by the defendant, but that the same was thereafter dismissed for want of prosecution.

Although no opinion was written in the case to which we have just called attention, the precise question of whether the *location of a route without purchase or condemnation of the land* gave to the

locating company a right to resist interference with the line by another corporation that had stepped in and purchased the land from the owner, was *directly involved* and was *decided*. It is also worth while and not improper to note that one of the counsel for the plaintiff in that case was the present Judge JONES of the Ohio Supreme Court.

In view of that decision, it certainly cannot be said that the Common Pleas decision on which the court below and the appellee here rely is, in truth, an expression of the settled law of Ohio. On the contrary, the doctrine that priority of location gives priority of right, even when the location is made by what the lower court calls "entirely private corporate action" (Rec., p. 47), has been clearly recognized in Ohio.

Moreover, the absolute unsoundness of the doctrine asserted by the appellee and sustained by the court below may be demonstrated, we think, by a concrete illustration: When the Power Company's case was heard before District Judge DAY the appellee vociferously argued that the company could not be deemed to have any "property" that was being taken or interfered with by the appellee because it had not purchased or condemned a single parcel of land. After Judge DAY had rendered his decision (210 Fed., 524) in which he admitted that the company had a " right to proceed," the Company purchased some of the land necessary for its dams and reservoirs, which land, as averred in the present bill, was purchased "for the purpose of using the same in connection with and in furtherance of its corporate purposes as aforesaid," *i. e.*, in accordance with plans of development adopted long before the City acted.

Now the appellee asserts that the purchase of this land "in no way bolstered up or fortified" the Power Company's rights (Brief, p. 41). The true nature of the appellee's contention and of the lower court's ruling is thus disclosed as a contention and ruling that the Power Company would not be entitled to protection against interference by third persons until it had purchased or condemned, not *some* land, but *each and every parcel of land needed by it in the construction of its entire plant and the conduct of its enterprise.* Under that view, the only right the law protects is the mere right of ownership of real estate which is acquired by purchase from private owners, and there never can be any assurance that, after having purchased or condemned ninety-nine out of a hundred parcels that may be needed for an enterprise, the whole undertaking will not be destroyed, and the land already purchased rendered useless, by the act of the private owner of the hundredth parcel in selling his land to a rival corporation. Hence, the ultimate meaning of the contention and ruling is that no rights are ever acquired by the State's grant and the incorporation amounts to nothing. The contention and ruling are thus precisely the same in principle as those rejected by this court in *Russell* v. *Sebastian*, 233 U. S., 195, and *New York Electric Lines* v. *Empire City Subway*, 235 U. S., 179. In the first of those cases it was said that under such a view of the law the State's offer of the "right to lay pipes" (or, as applied to this case, the right to appropriate the necessary land and construct the plant) could not be accepted at all. In the second of these cases this court specifically rejected the idea that the State's grant is a mere license until the rights con-

ferred by it are actually exercised and laid down the rule that the grant is a complete and binding contract *from the moment it is accepted* and that *the grantee is thus protected in* STARTING *the enterprise* and *during the initial stages* and *while the necessary proceedings preliminary to the execution of the proposed work are being taken.* It is further settled in those cases that when a company changes its position upon the faith of the State's offer and makes an investment of money committing itself to the undertaking, the offer of the State is accepted, *not step by step as the work proceeds, but as an entirety.*

We submit that the principles of those cases *compel* a holding that when the Power Company had adopted its plans it had accepted the State's offer *as an entirety* and its right to construct and maintain its plant in the place covered by those plans was then a complete and binding contract.

At page 34 of the appellee's brief it is baldly asserted that the doctrine "has never been affirmed by authoritative judicial decision." But in answer to that we have only to ask the court to note the cases to which we have just called attention (including the decision of the Jackson County Court of Common Pleas) and look at the array of authorities cited at page 31 *et seq.* of our first brief, or even its own decision in *Denver & Rio Grande R. R. Co.* v. *Arizona & Colorado R. R. Co.*, 233 U. S., 601, in which this court upheld the doctrine although the effect was to oust from the located line a completed railroad which had been constructed at a cost of $800,000, and was actually in operation.*

*This information is obtained from the briefs and records in that case in this court.

To those authorities we desire to add the recent decision of the New York Court of Appeals in *Matter of City of New York* (*Newport Ave.*), 218 N. Y., 274, in which the court sustained the doctrine of priority of location *in a contest between a railroad and a municipality,* and held that the location of the route gave the railroad such a prior and exclusive right thereto that the city could not condemn it. The court, per CARDOZO, *J.*, said:

> "That is the rule which has *always* been applied in controversies between rival railroads,"

and added:

> "We think it must also be the rule in controversies between a railroad and a city."

The appellee further asserts that, "the precise question has been determined adversely to appellant's claim by this court" in three cases, viz:

Adirondack Ry. Co. v. *New York,* 176 U. S., 335; affirming 160 N. Y., 225.
Underground R. R. v. *New York,* 193 U. S., 416.
Ramapo Water Co. v. *New York,* 236 U. S., 579.

A slight examination of those cases will show that statement to be wholly untrue.

In the *Underground Railroad case,* relief was denied because of the fact, clearly stated by this court in 193 U. S., at p. 429:

> "The consent of the municipal authorities and the consent of the abutting owners, or

> the substituted consent of the Supreme Court, were essential to the right to construct a railroad, and these it never obtained."

The company in that case could not demand the consents as a matter of right and could not acquire them *in invitum*, and yet its right to construct its road was expressly made dependent upon its obtaining them. Hence, in that case the company *did not have a complete grant.* It had never obtained a *right* to construct its road.

The *Adirondack case*, so far from being opposed to our claims clearly sustains them, for in that case it was said (160 N. Y., 246, approved 176 U. S., 346):

> "The effect of the map when filed was to *give warning to other railroads that a certain route had been pre-empted by the defendant.* It established no right against the owner, because the Constitution forbids it; it established none against the State, because its power is paramount, *but as against all other railroad companies and as against* ALL OTHER CREATURES OF THE STATE, *empowered to use the right of eminent domain, it gave the exclusive right to occupy the particular strip of land* for railroad purposes until the Legislature authorized it to be devoted to some other public use."

The *Ramapo case* likewise sustains our position, for while relief was denied in that case because the charter had been repealed by the Legislature and because that company *had not completed its location* by serving notices upon the landowners as required by the statute, this court expressly said (236 U. S., 584):

> "We appreciate the argument that although the corporation may have had no lien on the land or right as against the sovereign power, *it had a right as against* ALL SUBORDINATE BODIES *to exclude them from the lands of its choice.*"

Furthermore, we again call attention to the fact that, since the *Adirondack* and *Ramapo* cases were decided, the Court of Appeals of New York (in which State each of those cases arose) has again passed upon the question in *Matter of City of New York* (*Newport Avenue*), 218 N. Y., 274, and has clearly held that the doctrine that priority of location gives priority of right, which, in its own language, "has *always* been applied in controversies between rival railroads" is, also, "*the rule in controversies between a railroad and a city.*"

Indeed, at page 36 of its brief the appellee practically concedes that the doctrine does and must prevail as between rival railroad corporations, because, as the appellee well points out, "otherwise there might be no end of conflicting appropriations of such corporations." Thus, while admitting the existence of the doctrine, the appellee attempts to show that it does not apply here. The reasons suggested for such distinction are as follows:

> (*a*) "A railroad location is of a definite right of way covering a specific strip of land which may be indicated by plans and descriptions" (Brief, p. 36).

To this we reply that it is no doubt true that the cases are limited to those in which a corporation has made a *definite location,* but there is

nothing in the principle upon which those cases were decided that would limit its application to contests between rival *railroads,* and in *Nicomen Boom Co.* v. *North Shore Boom Co.,* 40 Wash., 315, the doctrine was extended to a contest between rival *boom* companies.

The location of the Power Company is just as definite as the right of way of a railroad and the bill distinctly shows that it has been "indicated by plans and descriptions."

In addition to this, for the purposes of the question here involved, the analogy between a railroad company and the Power Company under the Ohio law is complete. Both are organized under the same general law, both fix in their charters the *termini* of the improvement, both have the right to enter upon private lands for the purpose of surveying and definitely locating the lands which they will use for their improvement, both have the power to appropriate such property as may be necessary for the improvement, both appropriate that property under the same statutes, and the Power Company, by express provision of the statutes, is made a *common carrier,* "subject to all the liabilities and duties of such companies under the laws of the state," just as are railroad companies.

> (*b*) "By statute in some states the filing of such a map in a public office is required and has been held to be in itsef an act of appropriation although, as we have pointed out, such is not the law in Ohio where the actual payment of compensation must precede the acquisition of any rights in private property" (Brief, p. 36).

In answer to this we say: *First*, that the doctrine in no way depends upon the filing of a map, for it has been applied in many cases where no map was filed (*Fayetteville &c. Co.* v. *Aberdeen &c. Co.*, 142 N. C., 423; *Williamsport & N. B. R. R. Co.* v. *Philadelphia & Erie R. R. Co.*, 141 Pa. St., 407; *Chesapeake & Ohio Ry. Co.* v. *Deepwater Ry. Co.*, 57 W. Va., 641; *Denver & Rio Grande R. R. Co.* v. *Colorado & Arizona R. R. Co.*, 233 U. S., 601); *Second*, that the doctrine has been applied in many other cases arising in states in which, like Ohio, no title as against the landowner can be obtained until his compensation is paid (*Sioux City &c. Ry. Co.* v. *Chicago &c. Ry. Co.*, 27 Fed., 770; *Barre R. Co.* v. *Railroad Companies*, 61 Vt., 1; *Williamsport & N. B. R. Co.* v. *Philadelphia & Erie R. Co.* 141 Pa. St., 407; and see particularly pages 31 to 34 of our first brief).

> (*c*) "But as between a private corporation having the right of eminent domain for carrying on a business of a quasi public nature and a subdivision of a sovereign state, like a municipal corporation, which exercises the *power of eminent domain* to meet the most vital needs of its population for a supply of water, there can be no question but that the latter is given a *paramount right to appropriate* property needed for that purpose, although the same property has become subject to earlier appropriation proceedings by a private corporation" (Brief, pp. 36, 37).

Here the argument is that although the principle that priority of location gives priority of right applies as between rival railroad corporations it does not apply between a private corpora-

tion and a municipality. This argument, as already pointed out, has been specifically rejected in the *Adirondack* and *Ramapo* cases, and, also, in the recent decision in *Matter of City of New York* (*Newport Avenue*), 218 N. Y., 274, already quoted.

Indeed, the argument of the appellee upon this point is strangely confused. It asserts that as between a *quasi* public corporation and a municipality there can be no doubt that the latter is given "a paramount right to appropriate." We do not deny that municipalities may be and frequently are given a paramount right to appropriate property needed for water supply purposes, but obviously such "paramount right to appropriate" is a *right to take upon payment of compensation* and *not a license to confiscate and destroy without the payment of compensation.* As already stated, the appellee's brief abounds with such statements as that the Power Company's rights are subject to the paramount rights of the state or of the municipality to take property for its needs. That, however, adds nothing to the argument and does not show that the Power Company has not a contract or property right which cannot be impaired or taken without due process of law. If the rights of the Power Company be subject to such paramount right of the state or municipality it simply means that the municipality must pay for them if it takes them.

This, of course, is very obvious and elementary, but it seems necessary to draw specific attention to it because of the fact that the appellee continually refers to this paramount right as a justification for its acts in this case. If the City had proceeded in accordance with Section 2 of its ordi-

nance, which directs the City Solicitor to take proceedings in court for the assessment of compensation, this case would not be before this court. If, as it claims, the City had legislative authority to appropriate the Power Company's property, it could and should have proceeded in the manner pointed out by the Constitution and statutes of Ohio by having the compensation for the property taken assessed by a jury.

III.

With respect to the question of LACHES we are compelled to say that the appellee's statements and comments upon the facts are a distortion of the facts shown in the bill.

In the first place, the appellee attempts to convey the impression that the Power Company, having knowledge that the City intended to take the waters of the Cuyahoga River for the purpose of water supply, "hastened to amend its articles of incorporation so as to cover every possible field of the City's operations, filing such an amendment in February, 1912" (Brief, pp. 12, 13, 61). The fact is that the amended articles simply extended the company's charter so as to embrace the Von Schon Plan, which had been *adopted by the Power Company in April, 1909,* and *the right which is sought to be protected in this case is the right to construct and operate its plant in the place and in accordance with that plan in connection with the Roberts-Abbott plan adopted in 1908.* The City does not claim, even in its present brief, that it "became engaged in a project for betterment of its water supply" until 1911, which was *more than*

two years after the Power Company had adopted its plan of development; and it was not until May 27, 1912, that the City adopted its resolution declaring its intent to appropriate the waters of the Cuyahoga River. The appellee states, at page 13 of its brief, that in June, 1911, an engineering plan was prepared by engineers for the City, which plan involved the construction of a dam in Franklin Township, Portage County. This statement is not supported by anything in the record, and as the City has gone outside of the record to inform the court of the preparation of this plan, we likewise go outside of the record for the purpose of informing the court that that plan suggested *three entirely different possible sources of supply* for the City, and *it was not until the adoption of the resolution of May 27, 1912, that the City indicated which of those three sources of supply it intended to take.*

At page 61 of appellee's brief it is stated:

> "It (the Power Company) knew of the City's letting contracts for the construction of its works in April, 1913, but still no move is made to prevent the City's going forward with its project or in making the great outlays incident thereto, nothing but absurd offers and letters of assertion, disclosing a readiness to be dealt with, but evidencing *no intention of actually opposing or stopping the prosecution of the work.*"

At page 62 it is said:

> "The disastrous situation into which the City has been led *through the Power Company's standing by and permitting the City to proceed* seems to be recognized. * * *

Again, at page 63, reference is made to the fact that the City's dilemma has arisen "*through the Power Company's standing* by until the City had irretrievably committed itself to the enterprise."

To thus talk of the Power Company's "standing by" and "permitting the City to proceed" is a grotesque absurdity. So diligent was it in asserting its rights as against the City that the court below thought that was one of its chief industries. (Rec., p. 47.) The "absurd offers" to which the appellee's brief refers are shown in paragraph 28 of the bill to be an attempt on the part of the Power Company to harmonize the plans of the City and the Power Company in such way that both might use the river to mutual advantage, and an offer to pay the City $1,000 per mile "for the right to equalize the flow of said river"—a thing which would benefit rather than injure the City. Certainly, the Power Company is not to be criticised for attempting to avoid litigation by making concessions. When, however, its offers in this regard were rejected the Power Company, promptly and *as early as April 10, 1913*, formally notified the City, not only that its diversion of the water of the river would "necessarily invade the exclusive rights which this company now has in and to the waters of the Cuyahoga River," but also "THAT THIS CORPORATION STANDS ON ITS RIGHTS" (Bill, par. 29).

Can it truthfully be said that that letter evidenced "no indication of actually opposing or stopping the prosecution of the work?"

The city itself was *under the duty of taking the initiative* by instituting proceedings in court to assess the compensation—a duty which is imposed both by the Constitution and the statutes of Ohio

and is expressly recognized in §2 of the City's ordinance, where it is provided (Record, p. 13):

> "That the solicitor be and is hereby authorized and directed to apply to a court of competent jurisdiction to have a jury impanelled to make inquiry into and assess the compensation to be paid for such property."

Having given positive notice to the City that it *intended to stand on its rights*, the Power Company, within three months, *i. e.*, in July, 1913, filed a bill in the lower court to enjoin the City from proceeding.

In the appellee's brief it is stated that "In the meantime lands had been purchased and contracts involving millions had been let and the City irrevocably embarked on and committed to the prosecution of this great public improvement" (p. 62). There is not a line in the record to justify that statement, and to the best of our knowledge, information and belief it is untrue. At all events, the City knew before it let its contracts that the Power Company had been organized and claimed that the City's ordinance and its proceedings thereunder would constitute an illegal invasion of its rights and that the company intended to stand on those rights; and the averment of the bill, which must here be taken to be true, is that the City had knowledge of the incorporation of the company and of its plans for the development of the river *prior to the passage of its ordinance.*

Under these circumstances, the decision of this court in *New York* v. *Pine*, 185 U. S., 92, instead of justifying any imputation of laches or affording any ground for saying that the right to equitable relief has been lost, *clearly shows that in*

going ahead with notice of the Power Company's claims and of its announced intention to stand upon its rights, the City acted at its peril (see quotation from that case at page 94 of our brief). This court should say to the city what it said to the Denver & Rio Grande Railroad Company in *Denver & Rio Grande R. R.* v. *Arizona & Colorado R. R. Co.*, 233 U. S., 601, 603: You have gone ahead with full knowledge, but, of course, acquired no new rights by doing so (see quotation from that case at p. 97 of our brief).

In addition to all this, it must be borne in mind that the court below in this case *did not follow* the *Pine case*. The bill in the *Pine case* was not dismissed. On the contrary, this court, while denying equitable relief by way of injunction, remanded the case with instructions, not to dismiss the bill, but to enter a decree

> "providing for an ascertainment in the way courts of equity are accustomed to proceed, of the damages, if any, which the plaintiffs will suffer by the construction of the dam and the appropriation of the water, and for which the defendant is legally responsible, * * * and fixing a time within which the defendant will be required to pay such sum, and that *upon the failure to make such payment an injunction will issue as prayed for;* and, on the other hand, that upon payment a decree will be entered in favor of the defendant."

Therefore, even under the decision of the *Pine case* it was clearly erroneous for the court below to dismiss the bill.

IV.

It is not necessary for the appellant to show INSOLVENCY on the part of the City in order to entitle himself to the equitable relief prayed for, because the Ohio Constitution is imperative in its requirement that compensation for property taken under the power of eminent domain be *paid in money in advance*, and the Ohio Supreme Court has repeatedly held that a taking should be enjoined until the compensation is paid (see pages 84-86 of our first brief).

It is impossible, however, to see why the allegation of the bill that the City is "without funds with which and is financially unable to pay the damages which will be caused," &c., is not fully as strong as an averment that the City is "insolvent." Insolvency is, indeed, a conclusion drawn from the fact that one is "without funds" with which to meet obligations.

The lower court, explicitly announcing its refusal to accept as true the allegations of the bill on this point, went so far as to say that the City "is not insolvent but is abundantly able to pay" any claims it may justly owe (Rec., p. 48); and in view of that attitude of the court we append an extract from a recent report of the Ohio State Auditor, which being a public document compiled and filed by a public official pursuant to law, is properly within the judicial notice of this court (*Caha* v. *United States*, 152 U. S., 211, 221).

V.

The appellee's argument (Brief, pp. 42-46) that its own determination to take "all the waters

of the Cuyahoga River'' is conclusive, even in the face of the averments of the bill that the taking constitutes an unreasonable and unnecessary interference with the Power Company's enterprise and is ten times as much water as the City can possibly consume in any legitimate public use, is completely answered by the decisions of the Supreme Court of Ohio cited at pages 79 and 80 of our first brief. Of those decisions we call particular attention to *P. C. C. & St. L. Ry. Co.* v. *City of Greenvile*, 69 Ohio St., 487, in which it was distinctly ruled that, under such circumstances, a municipality's determination of the necessity for a taking may be challenged by suit in equity.

If there were no other question in this case, the wanton arbitrariness of the City in assuming to take ''all the waters of the Cuyahoga River'' and thereby destroying the river's vast capacity for public service to other inhabitants of the State, when the City cannot possibly make any legitimate use of that quantity of water for at least a generation to come, should induce this court to rebuke and stop the City's rapacious destruction of the State's natural resources which the Power Company is ready, willing and anxious to conserve and develop for the public good.

VI.

In view of the fact that in practically every State in the Union public utility corporations are formed almost exclusively by the filing of articles of incorporation under general laws, the issue now presented to this court is of tremendous importance. If the incorporation of the Power Com-

pany did not have the effect we claim—if the ruling of the court below and the contentions of the appellee be sustained—then practically no public utility corporation in any State "is protected in starting the enterprise," and if that be the law, it simply means that public utilities cannot be built (see pages 26 and 27 of our first brief).

Respectfully submitted,

GEORGE W. WICKERSHAM,
CARROLL G. WALTER,
Counsel for Appellant.

December, 1917.

APPENDIX.

EXTRACT FROM ADVANCE REPORT OF OHIO STATE AUDITOR TO THE GOVERNOR AND GENERAL ASSEMBLY OF OHIO FOR THE FISCAL YEAR ENDED JUNE 30, 1917.

"The Laws of Ohio provide that the Auditor of State shall annually compile statistics of all public indebtedness of the state's political subdivisions and include same in his annual report to the governor and general assembly."

* * * * * * * *

"The foregoing table reveals the amazing fact that while the eighty cities collected in taxes $26,411,178.00 for city purposes alone, it required $180,657.00 in excess of this vast revenue for the year to meet interest payments and retire bonds falling due and that there was not one cent left for regular running expenses. There were exceptions among the list of eighty cities, but as a whole Ohio cities paid the salaries of every public official, constructed all improvements and met every dollar of regular running expenses, not from taxation, but by means of new bond issues. The per cent. of annual income required to retire bonds falling due and pay interest, as shown in column 6, was an average of over one hundred per cent. for all Ohio cities. The last column of the table gives the tax rate for the past year in each city. Cities, under state law, can only levy five mills on each dollar of taxable property unless an increase is authorized by a vote of the people or by emergency legislation. Column 2 shows that

new debts created during the year were $2,985,-978.00 in excess of all revenues received from taxation, and $14,674,082.00 more than the total of old indebtedness retired.

"This kind of financial gymnastics indicates that in obtaining the above results many cities have violated practically every fiscal law on the statute books of the state. The reports of examiners on file in the bureau of inspection and supervision of public offices show that those in control in many taxing districts have no regard for the laws that seek to limit the creation of debt and prevent excessive taxation. Many public officials in Ohio seem to be acting on the theory that, by reason of the country being engaged in a world war the emergencies which necessarily confront the national government extend to all minor subdivisions and that any local taxing board may rape the constitution and laws with impunity. If our constitution and laws will not protect us in a crisis like this our government must fail.

"If there was ever a time in the history of Ohio when true conservatism and respect and obedience to law is needed, it is now. * * *

"A few less state roads, a few less state buildings, a few less city improvements, a few less school buildings, a few less ornate city halls, bridges, viaducts and parks during this world conflict will do no violence to the welfare of the people but will lessen the burden that is going to be passed down to our posterity, even to the fourth generation.

"* * * If the people of Ohio do not apply the brakes and retire to private life the spendthrift public officials who violate the laws, pro-

mote extravagance and declare emergencies where none exist, they will witness in the near future repudiation of public obligations by many taxing districts in Ohio.

"The succeeding table on debt and taxation will exhibit clearly to every citizen the deplorable condition of public finances in many taxing districts. It deserves a careful study by every voter and taxpayer in Ohio. * * * A debt-creating and law-violating policy by Ohio officials at this time is wore than criminal, it is treason."

The "foregoing table" referred to in the above quotation states the following with respect to the City of Akron:

Total municipal debt on July 1, 1916	$8,449,528
New debt created during the year ended June 30, 1917	228,570
Debt retired during year ended June 30, 1917	552,798
Total debt on June 30, 1917	8,125,300
Interest paid during year ended June 30, 1917	422,476
Per cent. of taxes assessed for year required to retire bonds and pay interest	92
Total taxes for municipal purposes assessed for the year	1,056,384
Tax rate in mills for municipal purposes for the year 1916-17	7.3

According to this statement, therefore, the City of Akron, with a tax rate nearly fifty per cent.

in excess of what the law allows, "unless an increase is authorized by a vote of the people or by emergency legislation," had available for *all municipal purposes,* other than retiring bonds and paying interest on same, only 8% of $1,056,384, viz.: $84,510.72.

The Auditor further says:

"NOTE: There are but five counties in Ohio with average tax rates under one per cent.—Fulton, Hancock, Lake, Logan and Putnam. This low average results from small tax rates in rural districts. With the exception of Findlay, the county seats of these five counties have tax rates far exceeding one per cent., three of the county seats being one and one-half per cent. or over. The foregoing table shows that as an average for the state, when a tax payer in Ohio pays one dollar of taxes it takes forty cents of the dollar to pay bonds maturing and interest due. Is it surprising that schools lack revenue and that *many cities are practically bankrupt*"?

SEARS, TRUSTEE, *v.* CITY OF AKRON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 105. Argued January 21, 22, 1918.—Decided March 4, 1918.

Mere incorporation and organization under the general laws of Ohio (Gen. Code, 1910, §§ 10128–10134,) with power to construct and operate a hydro-electric power system at places designated in the certificate and to take water rights and riparian property for that purpose, does not imply a contract between the State and the company that the supply of water available shall not be diminished. Hence, a subsequent appropriation of the water by a city, acting under state authority, which involves no taking of property acquired by the company by purchase or condemnation under its charter, does not operate to impair the obligation of the charter.

Even if such a contract could be implied, an act of the legislature expressly authorizing such appropriation by the city should be treated as an exercise of the State's power to amend the company's charter, reserved by Art. XIII, § 2, of the Ohio constitution, and as revoking or modifying the contract by subordinating the company's right to the right of the city.

A hydro-electric company, organized under the general laws of Ohio with power of condemnation, adopted, through its board of directors, a plan of development involving the acquisition of the waters of a stream, with riparian land, and began certain condemnation proceedings, but never commenced construction work, and acquired none of the land until after the legislature had authorized a city to appropriate the water and the city, under an ordinance, had made the appropriation and practically constructed its works for using it. *Held*, that whatever preference the company may have gained under the general laws of the State, as against rival corporations and municipalities, its right of appropriation, no property having been acquired under it, was subject to the State's reserved power exerted by the act of the legislature, and that the appropriation for the city was not an unconstitutional taking of the company's property.

A state statute *held* not to violate Art. I, § 10, of the Constitution, or the Fourteenth Amendment, in authorizing a city to determine

without hearing the necessity and extent of an appropriation of private property for its public purposes.

An ordinance for the creation of a waterworks system and supply, adopted by the city council of Akron, to take effect September 10, 1912, pursuant to Ohio Gen. Code, 1910, §§ 3677–3697, was not repealed by the constitution adopted September 3, 1912, providing for a referendum in such cases, Art. XVIII, § 5, since the constitution did not become effective until November 15, 1912, when the ordinance was a valid existing law, and the fact that no action may have been taken under the ordinance is immaterial.

Where there is no direct taking under the power of eminent domain, a riparian owner complaining of the act of a city in damming and diverting a stream for a municipal water supply will be remitted to his action at law for damages, unless the injury is clear and exceptional circumstances are present warranting resort to equity.

General allegations of fraud and insolvency *held* not to supply the absence of facts entitling plaintiff to equitable relief.

Affirmed.

THE case is stated in the opinion.

Mr. George W. Wickersham, with whom *Mr. Carroll G. Walter*, *Mr. William Z. Davis* and *Mr. Thomas F. Tracy* were on the briefs, for appellant.

Mr. John E. Morley, with whom *Mr. Scott Kenfield*, *Mr. Thos. H. Hogsett* and *Mr. Sheldon H. Tolles* were on the brief, for appellee.

Mr. William Z. Davis, by leave of court, filed a brief as *amicus curiæ* on behalf of the Cuyahoga River Power Co.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Akron, Ohio, lies on Little Cuyahoga River a short distance above its confluence with the Big Cuyahoga. In May, 1911, the legislature of Ohio granted to the city, by special act "the right to divert and use forever" for

the purposes of its water supply "the Tuscarawas river, the big Cuyahoga and little Cuyahoga rivers, and the tributaries thereto, now wholly or partly owned or controlled by the state." [1] The city already possessed, under the general laws of Ohio, power to appropriate for this purpose, by condemnation proceedings, the property of any private corporation.[2] Acting specifically in exercise of the power conferred by the special act and of every other power thereunto enabling, the city, by resolution of its council, passed May 27, 1912, declared its intention to appropriate all the waters, above a point fixed, of the Cuyahoga River and tributaries; and by an ordinance, passed August 26, 1912, it appropriated the same, directed its solicitor to apply to the courts to assess the compensation to be paid, and provided for the payment of "the costs and expenses of said appropriation" out of an issue of bonds theretofore authorized. The city then con-

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[1] Act (House Bill No. 357) of May 17, 1911, Ohio Laws, vol. 102, p. 175:

An act to provide for granting to the city of Akron, Ohio, the right to use and occupy certain waters and lands of the state for waterworks and park purposes.

Section. 1. That there is hereby granted to the city of Akron, in the County of Summit, and state of Ohio, the right to divert and use forever for the purpose of supplying water to said city of Akron and the inhabitants thereof, the Tuscarawas river, the big Cuyahoga and little Cuyahoga rivers, and the tributaries thereto, now wholly or partly owned or controlled by the state and used for the purpose of supplying water to the northern division of the Ohio canal, provided, however, and this grant is upon the condition that at no time shall said city use the waters of any such stream, to such extent or in such manner as to diminish or lessen the supply now necessary, to maintain the flow in and through the canal as said canal now exists or as hereafter may become necessary for navigation purposes for an enlarged canal and upon the further condition that the city of Akron shall at all times save the state harmless from all claims arising from such grant and construction thereunder.

[2] General Code of Ohio (1910), §§ 3677–3697.

structed a dam and reservoir at the place specified and announced its intention of diverting the water before or by August 1, 1915.

On July 24, 1915, John H. Sears, a citizen of New York, filed in the Federal District Court for the Northern District of Ohio this suit, praying that the further construction of dam and reservoir and the diversion of the water of the river be enjoined, and alleged, in substance, the following facts: The Cuyahoga River Power Company, a hydro-electric corporation, was organized under the general laws of Ohio,[1] in 1908. The character of the company's enterprise is described in *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300; and its possible rights were considered in *Cuyahoga River Power Co.* v. *Akron*, 240 U. S. 462. On July 15, 1915, the company de-

[1] Now General Code of Ohio (1910), §§ 10128–10134.

The bill recites:

"Said corporation was formed for the purpose of acquiring, erecting, building, maintaining and operating dams in the Cuyahoga River in the State of Ohio to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes; of acquiring, holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or convenient for the proper conduct of said business, and of doing any and all things necessary and incident to any of said purposes.

"The original articles of incorporation of said company provided that the improvements of said company should begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River below the City of Akron, Summit County, Ohio, and extend along said Big Cuyahoga River through the County of Summit to a point where said Big Cuyahoga River crosses the line between Summit and Portage Counties."

livered to him as trustee a deed of trust of all its property to secure an issue of $150,000 of bonds. The property rights or interests which it is alleged the city was about to appropriate and for which it had not paid and proposed not to pay, arose from these transactions of the company:

It caused to be made and had, on or about June 3, 1908, adopted by resolution of its board of directors, surveys, maps and plans known as the "Roberts-Abbot Plan." Later it caused to be made and, about April 23, 1909, adopted by resolution of its board of directors, supplemental surveys, maps and a plan, known as the "Von Schon Plan," together with description of the several parcels of land required for carrying it out. The first plan provided for development, on the Big Cuyahoga, above the confluence of the Big and Little Cuyahoga rivers, within the limits of the location and plan of development set forth in its certificate of incorporation; and the papers also described the various parcels of land which the company would require for the purpose. The supplemental plan called for an extensive development including most of the rivers of northeastern Ohio, and provided, among other things, for a dam on the Big Cuyahoga above that of the city. It was confessedly beyond the powers conferred by the original certificate of incorporation. That certificate was not amended to include the necessary additional powers until after the passage of the Act of 1911. No public record or filing was made of either of those plans; and the law of Ohio makes no provision for such filing or for any record except that involved in condemnation proceedings. No condemnation proceeding was taken except that instituted June 5, 1908, under the original plan. It does not appear that any property was acquired under these proceedings. Shortly before the commencement of this suit, the company acquired, at a point some distance below the city's dam, a small parcel of

land, which, however, extended only to high-water mark. It also acquired, at another place below defendant's dam from another riparian owner, a contract for a portion of the river bed and the right to regulate, as to this land, the flow of the river; and acquired options for certain other properties. But the company has not commenced anywhere on the river any part of the proposed water-power development.

The right of property which the bill seeks to protect is mainly, if not wholly, the alleged right to construct and operate, in places designated in the certificate of incorporation, the power system described, without danger of impairment by any act of defendants. The bill alleges that the company "became possessed of and vested with the right to exercise the State's power of eminent domain in order to appropriate and acquire for its own corporate purposes such private property as it deemed necessary for carrying out and performing the matters and things set forth in its said articles of incorporation;" and that the city's proposed action would impair contract rights of the company and also take its property without compensation in violation of the Federal Constitution. The city moved to dismiss the bill, contending that it did not appear from plaintiff's allegations that any contract rights of the company had been impaired or that the city had taken or used, or threatened or proposed to take or use, any property of the company; that, on the contrary, the bill showed that the company had no property right which the city's action, taken or proposed, would involve appropriating; and that, for this reason, it had refrained from including in the condemnation proceedings instituted by it any alleged property rights of the company, and had not given to it any notice of the city's takings.

The motion to dismiss the bill was sustained by the District Court, on the ground that the company did not possess any such contract right or property as the city

was alleged to have impaired or invaded or threatened to appropriate; and also on the ground that the bill did not set forth facts entitling plaintiff to seek relief in equity and did disclose laches. A decree was entered dismissing the bill; and a direct appeal to this court was taken under § 238 of the Judicial Code.

First: As to the alleged impairment of contract: Plaintiff contends that the incorporation of the company in 1908 under the general laws constituted a contract by which the State granted it the right to construct and operate a power system in the places designated in the certificate and the right to take property for that purpose and to have the water flow past that property uninterrupted and undiminished; and that the ordinance of 1912 is a law which impairs that contract in violation of Article I, § 10, of the Federal Constitution. It is clear that the contract right created by incorporation alone was not illegally impaired by the ordinance, because there was no contract by the State with reference to the water rights. Incorporation did not imply an agreement that the quantity of water available for development by the company would not be diminished. *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 371. The so-called charter simply conferred upon the company the power to take lands necessary for, and to construct thereon, the dams, locks, and other parts of its plant.[1] If by purchase or by right of eminent do-

[1] General Code of Ohio (1910):

"Section 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through

main under the charter powers the company becomes the owner of riparian lands, it acquires the riparian rights of former owners; or it may otherwise acquire from the owners specific rights in the use and flow of the water. But these would be property acquired *under* the charter, not contract rights expressed or implied in the grant of the charter. Furthermore, the contract inhering in the charter (as distinguished from property acquired under the charter) was subject to the State's reserved power to amend or repeal, as provided in Art. XIII, § 2, of the Ohio constitution. *Ramapo Water Co.* v. *City of New York*, 236 U. S. 579, 583. The Act of 1911, under which the city proceeded, may be treated as an amendment of the company's charter making its rights subject to those of the city, if that is necessary to justify the proceeding of the city, which the act authorized. See *State* v. *City of Hamilton*, 47 Ohio St. 52, 74; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258; *Berea College* v. *Kentucky*, 211 U. S. 45, 57.

Second: As to the alleged property rights: It follows from what has been said above, that at least until something more had occurred than incorporation, the city was free as against the Cuyahoga Company to appropriate

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tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid."

any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation. Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (a) when by resolution the board of directors adopted the plan or (b) when condemnation proceedings were begun. Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider. For it is clear that Ohio retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken, *Adirondack Ry. Co.* v. *New York State*, 176 U. S. 335; and the Act of 1911 and the ordinance were both passed before the company had acquired any property. Nor are we called upon to determine to what extent the commencement of the acquisition of needed property in preparation for the power development, or even actual commencement of construction, would have vested in the company the right to complete the development. For the property alleged to be now owned by the company was not acquired by it until after the city's development had been practically completed; and no work of construction has ever been commenced by the company.

Third: As to the alleged riparian rights: These consist of (a) the small parcel of land extending to high-water mark, which was acquired nearly three years after the ordinance of August 26, 1912, was passed; and (b) a contract with one Boettler for a portion of the river bed with a right to regulate flowage; and (c) certain options for other lands and rights, all of which also seem to have been acquired after the city's water development was practically completed. The city insists that the bill fails to show that it has taken or proposes to take or will injure

any of these, and also that it does not appear that the company has, in respect to any of these properties, any riparian right which conceivably could be taken or injured. This contention, which involves matters of state law, may possibly raise some questions presented to the state courts in *Boettler* v. *Akron*, 93 Ohio St. 490. But whether it is in all respects sound, we need not determine; for it is clear that, upon the facts alleged in the bill, the rights of the plaintiff in this property and the injury thereto, if any, are not such as to entitle him to relief in equity.

Fourth: Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both Article I, § 10, of the Federal Constitution and the Fourteenth Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking which would interfere with the company's project, since the city might have taken water from the Little Cuyahoga or the Tuscarawas rivers; and furthermore that it has taken ten times as much water as it can legitimately use. It is well settled that while the question whether the purpose of a taking is a public one is judicial, *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598; the necessity and the proper extent of a taking is a legislative question. *Shoemaker* v. *United States*, 147 U. S. 282, 298; *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 685; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 65. The legislature may refer such issues, if controverted, to the court for decision. *P. C. C. & St. L. Ry. Co.* v. *City of Greenville*, 69 Ohio St. 487.

Fifth: As a further ground for relief, plaintiff asserts that the whole water development of the city has been carried on without authority in law. The contention is, that the general statute on which the ordinance rests is

inconsistent with the new constitution, adopted September 3, 1912; that though the ordinance was passed before the new constitution took effect, it was not acted upon until after; and that therefore it was not within the saving clause and was repealed. Inconsistency is asserted for the reason that under the statute the city council possessed the full power to determine whether the city should undertake the water development, whereas the new constitution provided a right to a referendum on the subject, upon filing, within thirty days from the passage of the ordinance, a petition "signed by ten percentum of the electors of the municipality." Article XVIII, § 5. The bill alleges that the ordinance did not take effect until September 10, 1912; but the new constitution did not become effective until November 15, 1912. The ordinance was, therefore, a valid existing law when the new constitution became operative and was not repealed by it. The fact that no action may have been taken under the ordinance is immaterial. We need not, therefore, enquire whether plaintiff is in a position to avail himself of the alleged inconsistency.

Sixth: The city insists that it has not appropriated and does not intend to appropriate any property of plaintiff, and that, as to plaintiff, it is not exercising the power of eminent domain. If, as plaintiff contends, the city's whole water development is unauthorized, plaintiff clearly is not entitled to equitable relief. For then, the city's act in damming and diverting water would be that of an ordinary wrongdoer, for which riparian proprietors above or below, who are injured, would have only the usual remedy for a tort by an action at law for damages, unless exceptional circumstances render resort to a court of equity appropriate. *Parker* v. *Winnipiseogee Lake Cotton & Woollen Co.*, 2 Black, 545; *Osborne* v. *Missouri Pacific Ry. Co.*, 147 U. S. 248, 259. No such circumstances exist here. The bill shows clearly that, at least for the present,

the company cannot, by any conceivable diversion, be injured in any riparian properties and rights it may have; for it has not even commenced the construction of its projected power system, nor otherwise utilized the small parcel which it acquired shortly before this suit was instituted. Even if the company had riparian rights and should hereafter proceed with its development it might prove that defendant's diversion was of such a character that it would not substantially affect the company's use, *McElroy* v. *Goble*, 6 Ohio St. 187; or the circumstances might conceivably be such that the city would be held not to have exceeded its legal rights as riparian owner. *City of Canton* v. *Shock*, 66 Ohio St. 19; *Moody & Thomas Milling Co.* v. *City of Akron*, 93 Ohio St. 484; *Cleveland-Akron Bag Co.* v. *City of Akron*, 93 Ohio St. 486.

The absence of facts entitling plaintiff to equitable relief is not supplied by such general allegations of fraud and insolvency as the plaintiff has made.

Decree affirmed.

MR. JUSTICE DAY and MR. JUSTICE CLARKE took no part in the consideration or decision of this case.